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No. _____

Supreme Court, U.S.
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CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

SUBURBAN O'HARE COMMISSION; THE VILLAGE OF ADDISON; THE VILLAGE OF BENSENVILLE; THE CITY OF DES PLAINES; THE VILLAGE OF ELK GROVE VILLAGE; THE CITY OF ELMHURST; THE VILLAGE OF FRANKLIN PARK; THE VILLAGE OF HARWOOD HEIGHTS; THE VILLAGE OF ITASCA; THE VILLAGE OF NILES; THE VILLAGE OF NORRIDGE; THE CITY OF PARK RIDGE; THE VILLAGE OF SCHILLER PARK; THE CITY OF WOOD DALE; and LAWRENCE C. BIENEMAN,

*Petitioners,*

*v.*

ELIZABETH HANFORD DOLE, Secretary of the Department of Transportation; UNITED STATES DEPARTMENT OF TRANSPORTATION; RUSSELL A. OLSON, Regional Representative of the Department of Transportation, Region V; DONALD ENGEN, Administrator of the Federal Aviation Administration; FEDERAL AVIATION ADMINISTRATION; PAUL BOHR, Director, Great Lakes Region, Federal Aviation Administration; JOHN GUIDOTTI, Supervisor, Illinois Section, Chicago Airports District Office, Federal Aviation Administration; THE CITY OF CHICAGO, a municipal corporation; and JEROME R. BUTLER, Commissioner of the Department of Aviation of the City of Chicago,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## QUESTIONS PRESENTED

1. What are the standards and procedures to be applied by federal courts for addressing material issues of disputed fact relevant to the legality of challenged governmental action—be the challenged action that of the Congress, a state legislature, or a state or federal administrative agency?

2. Is there a difference between the procedures and standards for addressing material issues of disputed fact relevant to the legality of governmental action where the governmental action is challenged as violative of a constitutional prohibition against "arbitrary" government action (or any other constitutional limitation) and the standards and procedures for addressing material issues of disputed fact under the primary statutory frameworks developed by Congress over the last 80 years?

3. Is there a difference between the procedures for addressing material issues of disputed fact relevant to the legality of agency action under: A) the "substantial evidence" test; or, B) the "arbitrary and capricious test"?

4. In addressing material issues of fact relevant to the legality of agency adjudicatory action, when the jurisdictional statute states that judicial review shall be based on the substantial evidence test, can a Court of Appeals assume jurisdiction and review disputed fact issues under the substantial evidence test when there has been no trial and determination of the material issues of disputed fact before the agency?

## PARTIES TO THE PROCEEDINGS BELOW

Plaintiffs in the district court, and appellants in No. 85-1423, and petitioners in No. 85-1073, were: the Suburban O'Hare Commission; the Village of Addison; the Village of Bensenville; the City of Des Plaines; the Village of Elk Grove Village; the City of Elmhurst; the Village of Franklin Park; the Village of Harwood Heights; the Village of Itasca; the Village of Niles; the Village of Norridge; the City of Park Ridge; the Village of Schiller Park; the City of Wood Dale; and Lawrence C. Bieneman.

Defendants in the district court and appellees in No. 85-1423, and respondents in No. 85-1073 were: Elizabeth Hanford Dole, Secretary of the Department of Transportation; Russell A. Olson, Regional Representative of the Department of Transportation, Region V; Donald Engen, Administrator of the Federal Aviation Administration; Paul Bohr, Director, Great Lakes Region, Federal Aviation Administration; John Guidotti, Supervisor, Illinois Section, Chicago Airports District Office, Federal Aviation Administration; the City of Chicago, a municipal corporation; and Thomas Kapsalis, former Commissioner of the Department of Aviation of the City of Chicago. Jerome R. Butler, Commissioner of the Department of Aviation of the City of Chicago, was substituted for Thomas Kapsalis upon taking office. Additional respondents in No. 85-1073 were the United States Department of Transportation and the Federal Aviation Administration.

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SUBURBAN O'HARE COMMISSION; THE VILLAGE OF ADDISON; THE VILLAGE OF BENSENVILLE; THE CITY OF DES PLAINES; THE VILLAGE OF ELK GROVE VILLAGE; THE CITY OF ELMHURST; THE VILLAGE OF FRANKLIN PARK; THE VILLAGE OF HARWOOD HEIGHTS; THE VILLAGE OF ITASCA; THE VILLAGE OF NILES; THE VILLAGE OF NORRIDGE; THE CITY OF PARK RIDGE; THE VILLAGE OF SCHILLER PARK; THE CITY OF WOOD DALE; and LAWRENCE C. BIENEMAN,

*Petitioners,*

*v.*

ELIZABETH HANFORD DOLE, Secretary of the Department of Transportation; UNITED STATES DEPARTMENT OF TRANSPORTATION; RUSSELL A. OLSON, Regional Representative of the Department of Transportation, Region V; DONALD ENGEN, Administrator of the Federal Aviation Administration; FEDERAL AVIATION ADMINISTRATION; PAUL BOHR, Director, Great Lakes Region, Federal Aviation Administration; JOHN GUIDOTTI, Supervisor, Illinois Section, Chicago Airports District Office, Federal Aviation Administration; THE CITY OF CHICAGO, a municipal corporation; and JEROME R. BUTLER, Commissioner of the Department of Aviation of the City of Chicago,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgments and opinions of the United States Court of Appeals for the Seventh Circuit in the above entitled causes, Nos. 85-1073 and 85-1423.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit in No. 85-1073 was rendered on March 13, 1986. It is reprinted at page A-4 of the Appendix. The order of the United States Court of Appeals for the Seventh Circuit in 85-1073, denying rehearing *en banc* was rendered April 3, 1986. It is reprinted at page A-3 of the Appendix.

The opinion of the United States District Court for the Northern District of Illinois, *Suburban O'Hare Commission et al. v. Dole, et al.*, 603 F. Supp. 1013 (N.D. Ill. 1985), is reprinted at page A-31 of the Appendix. The order of the United States Court of Appeals for the Seventh Circuit in No. 85-1423, summarily affirming the District Court was rendered April 14, 1986. It is reprinted at page A-1 of the Appendix.

## JURISDICTION

The judgment of the Court of Appeals in 85-1073 was entered on March 13, 1986. A timely petition for rehearing and a suggestion for rehearing *en banc* was denied on April 3, 1986. The judgment of the Court of Appeals in 85-1423 was entered on April 14, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

## STATUTES INVOLVED

The relevant portions of the following pertinent statutes are set out verbatim in the Appendix: the Administrative Procedure Act, 5 U.S.C. Sections 554, 556, 557 and 706; the Administrative Orders Review Act, 28 U.S.C. Section 2347; the National Environmental Policy Act of 1969, 42 U.S.C. Sections 4321-4361; the Federal Aviation Act, 49 U.S.C. 1486; and the Airport and Airway Improvement Act of 1982, 49 U.S.C. Sections 2202 and 2208.

## STATEMENT OF THE CASE

### A. THE FACTS

This case involves the Federal Aviation Administration's decision under the Airport and Airway Improvement Act of 1982 ("AAIA")[1] selecting an alternative to meet the long-term 20 year aircraft operations demand for commercial airport traffic in one of the nations major "hub" metropolitan areas—metropolitan Chicago. The FAA's decision had its genesis in the procedural decisionmaking framework created by a district court Consent Decree entered October 14, 1982 in *Illinois ex rel. Scott v. Butterfield*[2] and the AAIA.

#### 1. The Butterfield Consent Decree

Under the FAA planning grant programs, cities like Chicago—which are called "hubs" in FAA parlance—are given planning grants to develop "Master Plans" which identify the airport facility needs of the hub to meet the 20-year long-term aviation operations demand for the area.

In addition to the Master Plan planning grants, the FAA has long had a construction grants program under the federal airport aid statute. This construction grants program has historically been based on individual construction projects

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[1] The current federal airport aid statute is called the Airport and Airway Improvement Act of 1982 ("AAIA"), 49 U.S.C. Section 2201 *et. seq.* (Chapter 31 of Title 49). Its immediate predecessor was the Airport and Airway Development Act of 1970 (P.L. 91-248). This legislation was in turn preceded by the Federal Airport Act of 1946 (P.L. 377). The AAIA and its predecessors are a completely separate category of legislation than the legislation creating the FAA regulatory role under the Federal Aviation Act of 1958, 49 U.S.C. 1301 *et. seq.)* (Chapter 20 of Title 49) and its predecessor, the Civil Aeronautics Act of 1938 (P.L. 75-706)

[2] No. 74 C 2410 in The United States District Court, Northern District of Illinois, Eastern Division. The Consent Decree is reproduced in the Appendix at A-109.

within an airport, e.g., a hanger, a terminal, or a runway. The danger of this isolated project-by-project grant decisionmaking is that it allows incremental expansion of air traffic without ever examining the long-term aviation needs of the area and the alternatives to meet those needs.

To stop this process at O'Hare, the State of Illinois and several of the petitioner suburbs brought suit in *Illinois v. Butterfield* to force the FAA to examine the long-term aviation operations demand for the Chicago area and the alternatives to meet that demand, and to select an alternative to meet that demand which did not involve ever increasing expansion of O'Hare.

In 1982, the State of Illinois and the plaintiff municipalities reached a settlement with the FAA and Chicago. Chicago and the FAA were allowed to proceed with Phase I construction of the Master Plan without litigation and without preparing an Environmental Impact Statement.

Rather than waiting for individual projects within Phase II to be submitted for isolated grant approval under the Airport and Airway Improvement Act of 1982, the FAA promised to make the decisions required under that Act, to follow the procedures required under that Act for the Master Plan projects *as a whole,* and to make those decisions *prior* to construction. Chicago, in turn, promised that it would not proceed with construction of Phase II until those procedures had been followed and the Master Plan decision had been made.

### 2. The Requirements of the Airport and Airway Improvement Act of 1982

As required by the Consent Decree framework, the FAA stated in the Final EIS that its decision to approve the Master Plan Project had to satisfy the following procedural and substantive requirements of the Airport and Airway Improvement Act of 1982. FAA Final EIS, p. 5. There are two key AAIA statutory obligations at issue here.

(a) Under Section 509(b)(5) of the AAIA, 49 U.S.C. Section 2208(b)(5), the Secretary of Transportation may not approve a project involving a "major" runway extension "unless the Secretary shall render a finding in writing . . . that no feasible and prudent alternative exists and that all reasonable steps have been taken to minimize such adverse effect."

(b) Under Section 509(b)(7)(A), 49 U.S.C. Section 2208(b)(7)(A), no project involving a "major" runway extension may be approved "unless the Governor of the State in which such project is to be located certifies in writing that there is a reasonable assurance that the project will be located, designed, constructed and erected so as to comply with applicable air and water quality standards." Under FAA regulations construction may not proceed in the absence of such certification.

### 3. The FAA's November 14, 1984 Substantive Decision on Alternatives

In the last ten years, the FAA has conducted two major studies addressing the alternatives available to accommodate increasing aircraft operations demand at the Nation's major "hub" metropolitan areas—including such major traffic centers as metropolitan Chicago, metropolitan Atlanta, New York and Los Angeles. In those studies, FAA expressly concluded: (a) that a new air carrier airport was necessary and was feasible for the metropolitan Chicago area; and (b) that major hubs such as Chicago could address existing and future traffic demand by shifting "transfer traffic" to other airports in other cities.

**a. Establishment of New Major Public Airports in the United States (FAA 1977).** In 1977, in response to a directive from Congress, the FAA conducted a major study of the 25 major airport hub cities to determine if any of the leading hubs needed a new airport and if a new airport was feasible.

*Establishment of New Major Public Airports in the United States,* FAA-ASP-77-3 (FAA August 1977). In that study the FAA concluded and reported to Congress that a major new airport was needed in Chicago to address existing traffic congestion at O'Hare and to meet future increases in demand, and that such an airport was both technically and economically feasible.

> . . . [R]elocations [i.e., new airport] appear *feasible* in terms of four airports (Atlanta, Chicago, Denver, Seattle). However, relocations are doubtful in Minneapolis, Philadelphia, St. Louis, and San Francisco and are clearly not feasible in Boston and New York.
>
> *Id.* at p.7-17 (emphasis added).

The report also emphasized the distinct environmental advantages of a new airport over older airports such as O'Hare. New airports can be developed with broad land buffers where the noise generated by aircraft can be absorbed either by vacant land buffer or by industrial, non-residential use of the land buffer. (*Id.* at 7-14.) By contrast, O'Hare has been developed from an old aircraft factory and WWII military field surrounded by preexisting residential communities: i.e., Park Ridge (established 1910), Elmhurst (established 1882), Bensenville (established 1884), DesPlaines (established 1925), etc. No land buffer was ever designed for O'Hare. For O'Hare the "buffer", i.e. the area of heaviest noise impact, is comprised of the residential communities which preexisted O'Hare.

**b. Airfield and Airspace Capacity/Delay Policy Analysis (FAA December 1981).** In 1981, the FAA conducted a second study to address the issue of increased demand and limited airport capacity at major hubs like Chicago and Atlanta, and proposed a number of solutions in addition to new airport construction. One solution was the diversion of existing and future incremental demand away from overtaxed hubs and use of other cities' airports where there was less congestion and

greater available supply. *Airfield and Airspace Capacity/ Delay Policy Analysis,* FAA-APO-81-14 (FAA December 1981). This alternative recognized that much of the traffic at most major hubs was independent of the particular hub and could use transfer points at other less congested hubs:

> . . . [M]any of the major congested airports serve as connecting points for domestic and international air carrier traffic. ORD [O'Hare], ATL, DEN, and JFK are prime examples. Less congested airports could serve a part of the connecting air carrier traffic now using congested hubs, thereby relieving congestion and reducing delay. . . . Active coordination of shifts in connecting traffic may also achieve diversion of air carrier traffic from congested hubs and provide better transportation with less capital expenditure.

*Id.* at pp. 117-118[3]

The FAA ignored these findings and these reports in deciding on how to meet long term aircraft operations demand in metropolitan Chicago.

**c. The FAA's Rejection of Alternatives It Had Declared Feasible.** On November 14, 1984, the Federal Aviation Administration issued a decision approving Chicago's FAA sponsored "Master Plan" for meeting the long-term (20-year) aircraft operations demand for metropolitan Chicago. (A-72). The FAA approved the alternative of a massive expansion of aircraft operations at O'Hare field, and rejected or ignored other alternatives which would not involve a massive increase in operations at O'Hare and which would have a less damaging effect on the residents of the communities surrounding O'Hare. The FAA approved the Master Plan to increase the air traffic load at O'Hare from the 1982 level of 591,000 flights per year to a 1995 level of 920,000 flights. It is undisputed that at a minimum, this increase in flight operations will result in 5000 more citizens being included in a noise zone which has been

[3] Approximately 50% of O'Hare's traffic never sets foot in metropolitan Chicago. This transfer traffic either originates or culminates in other locations and simply transfers at Chicago.

designated as having an unacceptable level of noise by the Department of Housing and Urban Development and the FAA. (See Affidavit of Dwight E. Bishop, par. 11, at A-267.)

In rejecting the alternatives of either a new airport or use of other cities' airports, the FAA never pointed to any evidence to support such rejection and never explained the contradiction between this rejection and FAA's own prior explicit findings that such alternatives were feasible. Instead, FAA asserted the following conclusions which are either not relevant to the alternative or are unsupported by any evidence:

**(1) Utilization of other airports for transfer traffic.** As to utilization of other airports in lieu of expanding traffic at O'Hare, the FAA "Record of Decision" stated:

> The Greater Rockford Airport and General Mitchell Field are too distant for most *Chicago area* travelers and are not suitable alternatives.
>
> FAA "Record of Decision", p. 4 (A-79)

This conclusion ignores the whole issue of "transfer traffic" air travelers who neither originate nor terminate in Chicago and who the FAA had previously found in its 1981 report could be accommodated by other cities' airports.[4]

**(2) Development of a new airport.** As to development of a new airport in lieu of expanding traffic at O'Hare the FAA stated:

> This alternative was not selected because of the difficulties in finding suitable sites, the extremely high costs of acquisition and development of a new site, and the long lead time to make it operational.
>
> FAA "Record of Decision", p. 4 (A-79).

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[4] See also the uncontested affidavits of Mr. Barry Bateman, Airport Director of Milwaukee County Airport (A-249), Robert Haveman (A-158), Joseph Carroll (A-198), and Richard deNeufville (A-238) on the issue of the feasibility of using other airports for transfer passengers.

At no time did FAA offer any evidence to support this conclusion or explain the contradiction between this claim and FAA's report to the Congress—which included detailed quantity and unit price information and site information—and which concluded that a new airport for the Chicago area was needed and feasible.[5]

## B. PROCEEDINGS IN THE COURTS BELOW

Petitioners herein initially brought an action in the United States district court challenging the FAA's November 14, 1984 decision as to compliance with the AAIA, NEPA, and the Clean Air Act. Jurisdiction was predicated on 28 U.S.C. Section 1331, and relief was requested under the Administrative Procedure Act. *Suburban O'Hare Commission et al. v. Dole, et al.*, No. 84 C 10387 (filed December 4, 1984). At no time did plaintiffs charge any violations of the Federal Aviation Act.

### 1. The Jurisdictional Claim of Section 1486

Defendants FAA and Chicago moved to dismiss the district court complaint on the grounds that jurisdiction to review the FAA's decision (approving the Master Plan proposal to meet the 20-year metropolitan aircraft operations demand by expanding O'Hare and by rejecting other alternatives) is exclusively granted to the Court of Appeals under 49 U.S.C. Section 1486. That section provides for exclusive review of FAA decisions made under the Federal Aviation Act and states in pertinent part:

> (a) Any *order*, affirmative or negative, issued by the Board or Administrator *under this chapter* . . . shall be subject to review by the courts of appeals of the United States.
>
> * * *

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[5] No cost analysis or site analysis was cited by the FAA to support its conclusion that a new airport was not a feasible alternative. See Haveman affidavit, at par. 63, A-181-82.

(e) The findings of facts by the Board or Administrator, if supported by *substantial evidence,* shall be conclusive.

(Emphasis added.)

**The "under this chapter" Issue.** Petitioners argued that exclusive Court of Appeals jurisdiction over decisions of the FAA was limited to decisions made under the Federal Aviation Act, i.e, "under this chapter" (Chapter 20), and did not extend to FAA decisions made under statutes which were not "under this chapter"—e.g., the airport aid statute, the AAIA (Chapter 31). At the FAA's urging, at least two separate Courts of Appeals have held that jurisdiction over challenges to decisions made under the airport aid statutes are not within "this chapter" under Section 1486, and that subject matter jurisdiction is *not* properly in the Courts of Appeals. *Schwab v. Quesada,* 284 F.2d 140 (3rd Cir. 1960)[6]; *City of Dallas v. Rentzel,* 172 F.2d 122 (5th Cir. 1949); *Cf. Morris v. Helms,* 681 F.2d 1162, 1163 (9th Cir. 1982).

**The "substantial evidence" limit on Court of Appeals jurisdiction under the 1914 FTC model jurisdictional grant.** Petitioners also emphasized that Section 1486 limited its jurisdiction—not only to cases under this chapter—but also to those cases involving material issues of disputed facts where the

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[6] "Petitioner asserts as the jurisdictional basis for review of the Administrator's action, Section 1006 of the Federal Aviation Act, 49 U.S.C.A. Section 1486(a), which confers jurisdiction on the United States Courts of Appeals to review: 'any order, affirmative or negative, issued by the Board or Administrator *under this chapter* * * *.' (Emphasis supplied.) Under the quoted language the Administrator's act, to be reviewable, must be taken pursuant to a section of that chapter, i.e., Chapter 20 of Title 49 (The Federal Aviation Act). The action petitioner would have reviewed was taken under a different chapter, i.e., Chapter 14 of Title 49 (The Federal Airport Act). Since these chapters are separate and distinct, the provision for judicial review of the Administrator's actions in the Federal Aviation Act affords no support whatsoever for jurisdiction to review the Administrator's actions under the Federal Airport Act." 284 F.2d at 141 (emphasis in original).

substantial evidence test could be applied on review. Section 1486 and its "substantial evidence" review of material issues of disputed fact in the Court of Appeals has its origins in the Civil Aeronautics Act of 1938 which is in turn one of many statutes modeled after the Federal Trade Commission Act of 1914, 38 Stat. 719. The FTC statute created direct Court of Appeals review of agency decisions and directed the application of the "substantial evidence" test to disputed issues of material fact.

The FTC model approach of direct Court of Appeals review applying the substantial evidence test was predicated on the agency conducting a trial for the determination of the disputed issues of material fact. This was the identical pattern adopted by the Congress in the APA for application of the substantial evidence test. (see discussion below).

Since—despite petitioners request for a trial before the agency on material issues of disputed fact[7]—there had been no trial below, Petitioners asserted that it was impossible to apply the substantial evidence test to these material issues of disputed fact and for that additional reason, there was no basis for Section 1486 "substantial evidence" jurisdiction in the Court of Appeals.

### 2. The District Court Decision

The district court found that it did not have jurisdiction over the petitioners' claims under the AAIA and that such jurisdiction rested exclusively in the Court of Appeals under Section 1486. It therefore dismissed for want of jurisdiction. *Suburban O'Hare Commission v. Dole*, 603 F.Supp. 1013 (N.D. Ill. 1985) (A-31).

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[7] Petitioner Bieneman made a written request for an agency hearing under Sections 556-557 of the APA on material issues of disputed fact. The FAA denied the request.

The district court agreed that Section 1486 mandated application of the substantial evidence standard, and agreed that the substantial evidence test could not be applied to material issues of disputed fact relevant to the FAA's decision under the AAIA where there had been no agency trial below. However, the court concluded that it was appropriate to disregard the statutory command that the substantial evidence test be applied. In its stead the district court said that the "arbitrary and capricious" standard should be applied. The district court believed that the arbitrary and capricious standard and the substantial evidence test were the same standard and required the same procedures when applied to material issues of disputed fact. 603 F. Supp. at 1029, n. 20.

### 3. The Court of Appeals Decisions

Prior to the dismissal by the district court, as an exercise in protective jurisdiction, petitioners filed a timely challenge in the Court of Appeals within the 60 day time limit of Section 1486. Petitioners also filed a timely notice of appeal of the district court's decision dismissing for want of jurisdiction.

The Court of Appeals decided the Petitioners challenge to the FAA November 14, 1984 decision on March 13, 1986. (A-4) A petition for rehearing was denied April 3, 1986 (A-3), and the Court of Appeals subsequently affirmed the district court's decision on subject matter jurisdiction by summary order (A-1), relying on the Court's March 13, 1986 opinion.

Though reaching the same result, the Court of Appeals reasoning on jurisdiction and scope of review differed substantially from that of the district court:

a. The Court of Appeals decided that Section 1486 extended jurisdiction over challenges to the FAA's order under the AAIA, an order which was not entered under Chapter 20 (the statute to which 1486 applies), because at the same time the agency entered three

other orders which were entered under Chapter 20—orders which were not ever challenged.

b. The Court of Appeals took a contrary stance to the district court and to the opinions of other circuits—which had ignored the statutory command of section 1486—and held that the substantial evidence test should be applied as a standard of review. (Slip opinion, pp. 15-18, A-18-21.) The Court acknowledged that when used in the APA, the "substantial evidence" test could not be applied unless there had been an agency trial below. (Slip opinion, at p. 16, A-19.)

The Court proceeded to purport to apply the substantial evidence test to the material issues of disputed fact between the petitioners and the FAA—even though there had been no agency trial proceeding below. The Court necessarily assumed that the Section 1486 command to use "substantial evidence"—based on the FTC 1914 model—created a different framework of standards and procedures for addressing material issues of disputed fact than did the APA when it used the identical "substantial evidence" standard. As to use of other cities' airports for transfer traffic, the court took two positions:

a. The Court assumed that directing transfer traffic to other airports and capping O'Hare could not be done by either the City of Chicago or the FAA: ". . . [T]he City cannot direct the resulting overflow to any particular location." (Slip opinion, p. 21, A-24.) Not only did the Court ignore FAA's repeated acknowledgment that the airport proprietor can impose a limit on the number of operations,[8] but the Court also ignored the FAA's

[8] See *Noise Abatement Policy*, FAA-EQ-78-11 (FAA November 1976), at pp. 32-34; *Guidance Document On Airport Noise Control*, FAA-EE-80-37 FAA August 1980, at pp. 49, 54.

regulatory authority to impose limits on use of various airports for both economic and environmental purposes.[9]

b. The Court assumed that FAA had made a factual finding that a shift of transfer traffic was neither practical nor possible: "... [A] decision by the FAA that such a shift is not possible or practical is amply supported by the record". (Slip opinion p. 21, A-24.) Yet the FAA's finding on use of other airports is limited to use by Chicago area passengers—it makes no findings as to the feasibility of shifting transfer passenger traffic. The complete absence of a finding on this key alternative is glaring given the FAA's prior published admissions and the uncontested affidavits of petitioners' expert witnesses that such transfer was feasible.

As to the feasibility of a new airport, the Court made several factual observations seeming to lead to the unstated conclusion that a new airport was not feasible. (Slip opinion pp. 21-22, A-24-25.) The Court of Appeals cited no record evidence to support these claims and ignored FAA's express report to Congress that a new airport was both needed in Chicago and feasible.

The Court of Appeals did not base its affirmance of the rejection on the feasibility of a new airport—there is simply no record evidence to support any claim that this alternative is not feasible. Instead, the court seemed to reject a new airport because it was a "long-term" alternative whereas the problem being addressed by the O'Hare expansion program was a "short-term" problem:

> A new airport may or may not be the best *long-term* solution to the problems of airport travel in and out of

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[9] See, e.g., *Northwest Airlines, Inc. v. Goldschmidt*, 645 F.2d 1309, 1318 (8th Cir. 1981); *City of Houston v. FAA*, 679 F.2d 1184, 1194-95 (5th Cir. 1982).

> Chicago, but the FAA and Chicago needed to formulate a plan to deal with the *short term* problems at O'Hare. The proposed development represents a reasonable response to those problems . . ."
>
> Slip opinion pp. 21-22, A-25

On the contrary, the whole purpose of the FAA funded "Master Plan" was to identify and select the "long-term" needs. This twenty year long-term project focus has been repeatedly acknowledged by the FAA and Chicago. According to Chicago and the FAA, the basic purpose of the Master Plan effort was to:

> . . . define and quantify the development of air carrier airport facilities to meet the *long-range future needs of the Chicago Metropolitan Area.*
>
> Master Plan, Volume XI, p. I-1 (emphasis added).

As to the AAIA Issues, the Court of Appeals acknowledged that the requirements of the AAIA applied to the O'Hare project. (Slip opinion p. 26, A-29). The Court further acknowledged that where a project involves a "major runway extension" the act imposes several requirements before the project may go forward. (See p. 5, *supra*)

The Court noted that "Runway 27R and 32L are, in fact, to be extended under Phase II of the project. The FAA contends that these are not "major" extensions for purposes of the Airport and Airway Improvement Act. FAA Order 5050.4 defines a major extension as one that will permit the accommodation of aircraft three decibels louder than those currently using the runway." (Slip opinion, p. 26, A-29.)

The Court then purported to address the evidence as to whether the proposed runway extensions were major—i.e. would allow aircraft operations three decibels louder. Nowhere

in the "Record of Decision" or the so-called "record" is there any discussion of the factual issue of whether aircraft emitting more than three decibels more noise will be using the new runway extensions at O'Hare. FAA's only evidence on this issue consists of an affidavit filed in the first instance before the Court of Appeals by FAA employee Michael Rose which states the conclusion—without supporting evidence—that the noise will only be one decibel louder. (A-294.) In contrast, Petitioners submitted a detailed affidavit by Mr. William C. Sperry, FAA and EPA's former top jet noise expert, [10] that the noise would be greater than three decibels, and attached the specific data drawn from FAA's own tables to show the noise levels greater than three decibels [11].

Instead of acknowledging that the affidavits of Rose and Sperry created a *genuine issue of material fact* to which some evidentiary procedure should apply, the Court treated as a *question of law* the issue of whether noisier aircraft—i.e., greater than three decibles—could use the runway. (Slip opinion, pp. 26-27, A-29-30), citing *Illinois Commerce Commission v. I.C.C.*, 749 F.2d 875, 880 (D.C.Cir. 1984). [12]

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[10] Mr. Sperry has served as Chief Aircraft Noise Control and Senior Technical Advisor on noise to the United States Environmental Protection Agency from 1973-1981. From 1967 to 1973 he served as the Chief of the Aircraft Noise Branch of the Office of Noise Abatement of the Federal Aviation Administration. (A-252.)

[11] Sperry's tables are drawn from both the official FAA regulation referenced in the FAA regulations (Table 1), and the official EPA publication referenced by Rose as the basis for estimating the noise from heavier aircraft of the same type. (Table 2) (A-300-01.)

[12] There is no agency finding of fact on this issue, and Rose's testimonial affidavit comes after the agency decision. Technically speaking, the substantial evidence test should not be applied to the Rose and Sperry affidavits since there was no trial below. More appropriately the issue of material fact should first be tried according to some trial procedure. 28 U.S.C. Section 2347 provides a model for just such a trial.

## REASONS FOR GRANTING THE WRIT

### THE DECISION BELOW ILLUSTRATES SERIOUS CONFUSION AND CONFLICT BETWEEN THE LOWER COURTS, THIS COURT, AND THE CONGRESS OVER THE STANDARDS AND PROCEDURES TO BE USED IN ADDRESSING GENUINE ISSUES OF MATERIAL *FACT* RELEVANT TO THE LEGALITY OF AGENCY ACTIONS BEING CHALLENGED

#### A. Questions of "fact" vs. Questions of "law"

The first year law student learns early that the world of law is divided into questions of "law" and questions of "fact". Where the issue is characterized as a question of "law", the general maxim is that questions of "law" can and should be decided anew—i.e. *de novo* by the courts at all levels of review.

Questions of "fact" have been treated differently than questions of law. A further distinction has been made between those controversies where the "facts" are not in dispute and those controversies where there are genuine issues of material fact.

#### B. The Central Question and the Current Problem

What are the procedures and standards to be applied when the relevant facts *are* in dispute? In particular, what are the standards and procedures to be applied when there are genuine issues of material fact as to the underlying facts relevant to the legality of governmental action—be that action is legislative or administrative—by the state or the federal government?

For reasons explained below, this question—which has a rather clear answer—has created consternation and confusion in the lower courts. Legal terms such as "substantial evidence" and "arbitrary and capricious"—which historically embodied easily understood and clear standards and procedures for those situations where there were material issues of fact relevant to

the legality of the governmental action—have now become confused by a plethora of unclear, inconsistent, and conflicting applications. The lower courts are applying these terms without regard to their historical and logical content and in disregard of the procedural frameworks mandated by Congress for addressing these material issues of disputed fact. Moreover, not the least of this confusion has been engendered by decisions of this Court which are both internally inconsistent and in conflict with the clear mandate of the Congress.

This confusion has also created a secondary problem of serious magnitude. Courts of Appeals and this Court are being increasingly asked to resolve controversies where the legality of the challenged action is based upon material issues of disputed fact which have not been tried and determined below—either in the agency or in the district court. Absent explicit procedures for remanding controversies for trial and resolution of the material issues of disputed fact—such as the procedures mandated by Congress in the Administrative Orders Review Act, 28 U.S.C. Section 2347 (b)—Courts of Appeal are functionally incapable of dealing as *nisi prius* courts to address unresolved disputed fact controversies. Moreover, as this Court has emphasized in *Vermont Yankee*, the Courts of Appeal are not authorized to send the material issues of disputed fact back to the agency for trial—where the agency has no statutory or constitutional requirement to conduct adversarial proceedings. As described below, this dilemma can be resolved simply by returning to the frameworks mandated by Congress for resolving material issues of disputed fact.

### C. The Constitutional and Statutory Models for Addressing Underlying Material Issues of Disputed Fact Relevant to the Legality of Agency Action

What are the standards and procedures to be applied when there are genuine issues as to the underlying material facts

relevant to the legality of governmental action? At least through the first seventy years of this Century, the answer to the question was clear. The Constitution and the Congress provided five basic frameworks for addressing material issues of fact underlying challenged government action:

**1. The Constitutional model for trial and determination of disputed issues of material fact underlying government action.** Under this constitutional model—where there was no requirement that the governmental body whose action was being challenged provide a trial below—the material issues of disputed fact relevant to the question of whether the challenged action was "arbitrary and capricious" were tried and determined by the district court. Under the "arbitrary and capricious" standard, the person challenging the action had the burden of proof in the trial of disputed facts before the district court, but the challenger was entitled to a trial of disputed facts. As the Court stated in *Borden's Farm Products Co., Inc. v. Baldwin*, 293 U.S. 194 (1934):

> Respondents invoke the presumption which attaches to the legislative action. But that is a *presumption of fact, of the existence of factual conditions supporting the legislation. As such, it is a rebuttable presumption.* . . . When the classification made by the legislature is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, and one who assails the classification must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary.
>
> * * *
>
> *But where the legislative action is suitably challenged, and a rational basis for it is predicated upon the particular economic facts of a given trade or industry, which are outside the sphere of judicial notice, these facts are properly the subject of evidence and of findings.*
>
> 293 U.S. at 209-210 (emphasis added).

**2. The Interstate Commerce Commission one-trial "substantial evidence" review of material issues of disputed fact.** A one-trial "substantial evidence" model existed under the Urgent Deficiencies Act of 1913, 38 Stat. 220, with the appellate review of the agency trial findings conducted by a three judge district court under the "substantial evidence" test until replaced by an appellate court by the Administrative orders Review Act of 1950 (the Hobbs Act).

**3. The Federal Trade Commission Act one-trial "substantial evidence" model.** The Federal Trade Commission Act of 1914 model was premised on the recognition that under the ICC model, the trial of material issues of disputed fact had been provided by the agency, and that since there was no need for a second trial, review could begin in the Court of Appeals with review of the agency trial findings on disputed fact issues under the "substantial evidence" test.

**4. The APA one-trial "substantial evidence" review of material issues of disputed fact.** The one-trial constitutional legislative review model of *Borden's Farm,* the one-trial ICC substantial evidence model under the Urgent Deficiencies Act, and the one-trial FTC model were the models followed by the Congress in the passage of the APA for addressing material issues of disputed fact relevant to the legality of challenged agency action. Where there was a trial before the agency, the reviewing court, be it the district court or the Court of Appeals, served as an appellate tribunal as to fact issues, and treated the findings of the agency with deference under the substantial evidence test. Where, however, there was no trial and determination of disputed facts below, the district court tried and determined the disputed fact situation.

Congressman Walter, one principal architect of the APA, commented on the requirements of Section 554 regarding agency trials:

> The requirements of section 5 [554] are thus limited to cases in which statutes otherwise require a hearing be-

cause, where statutes do not require an agency hearing, the parties affected are entitled to try out the pertinent facts in court.

Legislative History of the Administrative Procedure Act, S.Doc. 248, 79th Cong. 2d Sess. (1946) (hereafter "Legis. Hist.") at p. 359.

The House Judiciary Committee similarly stated:

In short, where a rule or order is not required by statute to be made after opportunity for agency hearing and to be reviewed solely on the record thereof, the facts pertinent to any relevant question of law must be tried and determined *de novo* by the reviewing court respecting either the validity or application of such rule or order—because facts necessary to the determination of any relevant question of law must be determined of record somewhere and if Congress has not provided that an agency shall do so, then the record must be made in court.

H.Rpt. No. 1980, Legis. Hist. at p. 280.

Congress clearly wanted disputed issues of fact underlying agency action to be tried and determined somewhere. If the disputed facts are not tried and determined by the agency in an agency trial, then they must be tried and determined in the District Court.[13]

**5. The Administrative Orders Review Act of 1950 (Hobbs Act) one-trial model.** The Hobbs Act was the culmination of an effort by the Judicial Conference of the United States to consolidate judicial review in the Courts of Appeal. In several years of discussion, the Judicial Conference Committee repeatedly emphasized that disputed facts in such cases were to be tried in district courts and that Courts of Appeals were unsuitable.

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[13] The Senate Judiciary Committee also emphasized the need for a district court trial on disputed issues of fact where there had been no agency trial below. *See* Legis. Hist., at pp. 22 and 214.

> We concluded that there were certain types of orders made by the Commission, which could not be reviewed in the circuit courts of appeals on the record made before the Commission. Certain orders in emergency matters are made without any hearing. *Other orders, legislative or purely administrative in character are made upon informal hearings in no sense adversary in character. Such orders, your committee believes, can only be reviewed adequately upon a trial de novo in a nisi prius court. The circuit courts of appeals are not well equipped to conduct such trials.*
>
> > *1945 Report of the Judicial Conference Committee on Review of Orders of the Interstate Commerce Commission and Certain Other Administrative Orders, reprinted in: Providing for the Review of Orders of Certain Agencies, and Incorporating into the Judicial Code Certain Statutes Relating to Three-Judge District Courts: Hearings on H.R. 1468, H.R. 1470, and H.R. 2271, before Subcomm. Nos. 3 and 4, 80th Cong., 1st Sess., March 7, 11 and 24, 1947, and on H.R. 2915 and H.R. 2916 before Subcomm. No. 2 of the House Comm. on the Judiciary, 81st Cong. 1st Sess. 87, March 10 and April 1, 1949* (Hobbs Act Hearings), at p. 87 (emphasis added).

In explaining how the final draft of the Hobbs Act addressed those situations where there had been no agency trial below and there were material issues of disputed fact, Judge Phillips, Chairman of the Judicial Conference Committee which drafted the bill, explained the device of Section 7—now Section 2347—as follows:

> We used this sort of device, and you will find it in Section 7 of H.R. 1470. We provide that if the order was made up without a hearing, and, in fact, the hearing was required by law, the Court should remand the case and direct a hearing. That would be obvious of course.
>
> We further provide that if a hearing is not required by law and it is made to appear by the pleadings and affidavits filed by the parties that no genuine issue of material fact is involved and only questions of law are presented, so that

really no hearing on the facts was necessary, then the Court may review the law questions in that sort of case.

*But if it appears that there were genuine issues of fact and no hearing was had, then the Court transfers the case to the United States district court for a trial in that court as if it had originally been instituted there.*

Hobbs Act Hearings, *Id.*, at p. 28. (emphasis added).

### D. The Meaning of "Substantial Evidence" and "Arbitrary and Capricious" and their Relationship to Material Issues of Disputed Fact Under the Five Constitutional and Statutory Frameworks

These five frameworks basically share an identical structure for addressing material issues of disputed fact and use the terms "substantial evidence" and "arbitrary and capricious" in a clear and consistent manner.

**1. Agency Trial and the Substantial Evidence Standard.** Where the governmental body whose decision is being challenged has provided a trial on the disputed issues, the reviewing court has applied the "substantial evidence" test to findings of the other governmental body as to disputed issues of material fact. Under these frameworks, the substantial evidence doctrine has developed a clear meaning and understanding, and several corollary requirements have been established. The law is clear that a reviewing court applying the substantial evidence test must examine both the evidence supporting the agency's factual claim and the evidence *contrary* to the agency's claim, and then determine based on this "whole record" whether reasonable men could reach the agency's finding. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951).

One of the key corollary requirements of the substantial evidence doctrine is that the agency must have provided a trial

on material issues of disputed fact before the "substantial evidence" test can be applied. This logical link between an agency trial on the material issues of disputed fact as a prerequisite to the application of the "substantial evidence" test on appellate review of the disputed fact issues is an essential element which has existed under all of these frameworks.

> *Review under the substantial evidence test is authorized only* when the agency action is taken pursuant to a rulemaking provision of the Administrative Procedure Act itself, 5 U.S.C. § 553 (1964 ed., Supp. V), *or when the agency action is based on a public adjudicatory hearing.* See 5 U.S.C. §§ 556, 557 (1964 ed., Supp. V).
>
> *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 414 (1971) (emphasis added).

**2. The Situation Where No Agency Trial on Material Issues of Disputed Fact is Required.** In contrast to the situation where the agency has provided an agency trial (hearing) on disputed issues of material fact—whether as a legal requirement or voluntarily—is the situation where the agency has no obligation to provide a trial prior to taking action: e.g., legislation, rulemaking or so-called "informal" adjudicatory action. Under these circumstances, there is no basis for application of the "substantial evidence" test—because there has been no trial of the material issues of fact. As each of these frameworks makes clear, when there has been no agency trial required on material issues of fact, the material issues of fact are tried and determined in the district court.

Just as the "substantial evidence" test has had clear historical and logical meaning which has been expressly limited to the situation where there has been an agency trial on disputed facts, the term "arbitrary and capricious" has also had a clear meaning. In contrast to the "substantial evidence" doctrine—which is limited to review of disputed questions of fact after an agency trial below—the arbitrary and capricious standard is much broader and encompasses both questions of

"law" and questions of "fact". The so-called "arbitrary and capricious" standard has constitutional roots and has covered at least three different situations:

a. When legislative or administrative action has been challenged as "arbitrary" (i.e. without basis in fact or without logical connection between the facts and the action)—and there *has been no* trial of the disputed fact issues by the governmental body whose action is challenged—the reviewing court has tried and determined the disputed fact issues. See, e.g., *Borden's Farm Products, supra.* In such circumstances, the substantial evidence standard has no role in the determination of whether the action was arbitrary.

b. When legislative or administrative action has been challenged as "arbitrary" (i.e. without basis in fact or without logical connection between the facts and the action)—and there *has been* a trial before the agency—the reviewing court has applied the substantial evidence test and has declared that a decision not based on substantial evidence would be arbitrary and capricious and therefore unconstitutional. See e.g., *Interstate Commerce Commission v. Louisville and Nashville R.R. Co.*, 227 U.S. 88 (1913).

c. When the legislative or administrative action has been challenged as "arbitrary" (i.e. without basis in fact or without logical connection between the facts and the action), and there were no disputed issues of material fact, the court would still examine whether there was a rational connection between the undisputed facts and the conclusion reached by the agency. See e.g., *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156, 168 (1962).

In only one of these three situations does the standard of "substantial evidence" become involved with the standard of

"arbitrary and capricious". In that situation—where there has been a trial before the agency—the reviewing court is of course limited on review of disputed issues of fact to the substantial evidence test. Where, however, there has been no trial below, and material issues of disputed fact exist, each of the constitutional and statutory models cited above provides that the district court should hear and determine material issues of disputed fact with the burden of proof being on the person challenging the government action.

### E. The Contradictions, Conflicts, and Anomalies Rampant among the Lower Courts in Addressing Material Issues of Fact Underlying Government Action Are Illustrated by the Decisions Below

The lower courts have lost sight of the basic constitutional and statutorily mandated standards and procedures for addressing material issues of disputed fact underlying government action. The lower courts are pulling pieces of the various frameworks out of context without adhering to the limits and requirements of these frameworks. The courts have been mixing up the requirements of the substantial evidence test with the separate requirements for addressing material issues of disputed fact where there has been no trial in the agency below.[14] For example, the lower courts here displayed a flagrant disregard for these limits:

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[14] A good deal of the lower court's confusion can be attributed to this Court's decision in *Overton Park*. While the Court correctly summarized the legal framework for applying the "substantial evidence" test, it incorrectly described the procedures for addressing material issues of disputed facts when there has been no required agency trial below. That portion of the decision conflicts with the Constitutional *Borden's Farm* model, the FTC model, the APA model, and the Administrative Orders Review Act model. As such, the *Overton* decision ignores the Constitution and the express mandate of the Congress, and conflicts with this Court's decision in *Vermont Yankee*.

1. The Court of Appeals applied the "substantial evidence" test to address material issues of disputed fact when there had been no agency trial below. This violated the express mandate of the APA framework and the clearly understood parallel framework of Section 1486. In applying the "substantial evidence" test to material issues of disputed fact in this case, the Court of Appeals attempted to honor the letter of the statutory command without honoring the corollary requirement that the substantial evidence test only be applied where there has been an agency trial below.

2. In its misguided attempt to apply the "substantial evidence" test, the Court of Appeals never examined or commented on the evidence contrary to the FAA's claims—including the FAA's own admissions that a new airport was feasible and that other cities' airports could be used for transfer traffic. The Court's action plainly violated the mandate of *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951).

3. The Court of Appeals assumed jurisdiction under a statute which limits its jurisdictional grant only to those cases in which the substantial evidence test can be applied—i.e., those cases in which material issues of disputed fact have been subjected to an agency hearing under Sections 556-557 of the APA. Absent such a hearing, the Court of Appeals had no jurisdiction.

4. The District Court assumed that the arbitrary and capricious standard and the substantial evidence test were identical, and therefore the reviewing court could apply the "arbitrary and capricious" test in the same manner as the "substantial evidence" test. In reality, where there has been no trial below, there is no basis for applying the substantial evidence test to material issues of disputed fact—whether the substantial evidence test is called by its own name or by the name "arbitrary and capricious". The proper procedure would

have been to remand the case for trial on disputed issues of material fact.[15]

5. In a further attempt to avoid the dilemma of where to try material issues of disputed fact, the District Court suggested that the Court of Appeals could always remand the material issues of disputed fact for trial before the agency. But such remand is premised on the assumption: a) that the agency can be ordered to conduct adversarial fact finding proceedings to resolve material issues of disputed fact; and, b) that the agency is the forum selected by Congress to try and determine such issues. The assumption is wrong on both counts. Where neither Congress nor the Constitution requires the agency to conduct adversarial trial proceedings to resolve material issues of disputed fact, the courts have no authority to require the agency to conduct such proceedings—either before or after the agency decision. See *Vermont Yankee, supra; Aircraft Owners and Pilots Association v. FAA*, 600 F.2d 965, 970 n.25

[15] The district court's confusion was based on the fact that many courts have declared that arbitrary and capricious and substantial evidence are the *same* standard. See e.g. *Pacific Legal Foundation v. Department of Transportation*, 593 F.2d 1338, 1343 n.35 (D.C.Cir. 1979); *Association of Data Processing v. Board of Governors*, 745 F.2d 677, 684 (D.C. Cir. 1984); *Associated Industries of New York v. Department of Labor*, 487 F.2d 342, 349-350 (2nd Cir. 1973). In contrast, other courts have stated that the arbitrary and capricious standard is more lenient than the substantial evidence standard. See *American Paper Institute, Inc. v. American Electric Power Service Corp.*, 461 U.S. 402, 413, n.7 (1983); *Maryland Department of Human Resources v. Department of Health and Human Services*, 763 F.2d 1441, 1451 n.7 (D.C. Cir. 1985); *Pokratz v. Jones Dairy Farm*, 771 F.2d 206, 209 (7th Cir. 1985). In reality, both lines of cases are wrong. Arbitrary and capricious is "more lenient" to the agency simply because under the arbitrary and capricious standard the burden of proof is on the challenger. The "arbitrary and capricious" standard still requires that the challenger be given an opportunity to have the material issues of disputed fact tried and determined in court. In contrast, under "substantial evidence", the trial is before the agency and the agency has the burden of proof. *Steadman v. SEC*, 450 U.S. 1(1981).

(D.C.Cir. 1979). The second reason the courts could not remand to the agency for adversarial proceedings to resolve material issues of disputed fact is that Congress has assigned the function of trying and determining disputed facts to the district court where the agency has not conducted (and is not statutorily required to conduct) an adversarial trial on material issues of disputed fact. The courts must honor Congress' allocation of the fact finding function.

## CONCLUSION

For all the foregoing reasons, petitioners respectfully request this Court to issue a writ of certiorari to review the judgments and opinion of the United States Court of Appeals for the Seventh Circuit in Nos. 85-1073 and 85-1423.

Respectfully submitted,

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No. 86 - 1

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

SUBURBAN O'HARE COMMISSION; THE VILLAGE OF ADDISON; THE VILLAGE OF BENSENVILLE; THE CITY OF DES PLAINES; THE VILLAGE OF ELK GROVE VILLAGE; THE CITY OF ELMHURST; THE VILLAGE OF FRANKLIN PARK; THE VILLAGE OF HARWOOD HEIGHTS; THE VILLAGE OF ITASCA; THE VILLAGE OF NILES; THE VILLAGE OF NORRIDGE; THE CITY OF PARK RIDGE; THE VILLAGE OF SCHILLER PARK; THE CITY OF WOOD DALE; and LAWRENCE C. BIENEMAN,

*Petitioners,*

*v.*

ELIZABETH HANFORD DOLE, Secretary of the Department of Transportation; UNITED STATES DEPARTMENT OF TRANSPORTATION; RUSSELL A. OLSON, Regional Representative of the Department of Transportation, Region V; DONALD ENGEN, Administrator of the Federal Aviation Administration; FEDERAL AVIATION ADMINISTRATION; PAUL BOHR, Director, Great Lakes Region, Federal Aviation Administration; JOHN GUIDOTTI, Supervisor, Illinois Section, Chicago Airports District Office, Federal Aviation Administration; THE CITY OF CHICAGO, a municipal corporation; and JEROME R. BUTLER, Commissioner of the Department of Aviation of the City of Chicago,

*Respondents.*

## APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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# United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

April 14, 1986.

**Before**

**Hon. WALTER J. CUMMINGS, Chief Judge**
**Hon. LUTHER M. SWYGERT, Senior Circuit Judge**
**Hon. JESSE E. ESCHBACH, Senior Circuit Judge**

**No. 85-1423**

**SUBURBAN O'HARE COMMISSION et al.,**
*Plaintiffs-Appellants,*

*v.*

**ELIZABETH HANFORD DOLE, Secretary of the Department of Transportation, et al.,**
*Defendants-Appellees.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 84 C 10387
Ilana D. Rovner, *Judge*

This matter comes before the court for its consideration of the following documents:

1. "MEMORANDUM FOR FEDERAL RESPONDENTS" filed herein on April 2, 1986.

2. "SUGGESTIONS OF APPELLEE CITY OF CHICAGO REGARDING DISPOSITION OF DOCKET NO. 85-1423" filed herein on April 3, 1986.

3. "MEMORANDUM OF PLAINTIFFS-APPELANTS" filed herein on April 3, 1986.

Plaintiffs-Appellants originally sought to challenge the FAA's decision to approve the O'Hare expansion in the district court. Judge Rovner dismissed the case for lack of jurisdiction finding that jurisdiction rested exclusively with the court of appeals. Following Judge Rovner's decision plaintiffs-appellants filed both an appeal from the district court's dismissal (85-1423) and an original petition for review (85-1073) in this court.

We held the appeal from Judge Rovner's order in abeyance pending our decision on the petition for review.

On March 13, 1986 we issued our opinion in 85-1073 finding that this court had exclusive jurisdiction over the case. On March 20, 1986 we invited the parties to the instant appeal to suggest the proper disposition of appeal 85-1423 in light of our decision in 85-1073.

Appellees suggested that we summarily affirm the district court. Appellants did not contest this but suggested that we wait until the petition for rehearing in 85-1073 had been disposed of. On April 3, 1986, we denied the petition for rehearing in 85-1073. Accordingly,

IT IS ORDERED that the February 28, 1985 order of the district court, which is the subject of appeal 85-1423 is hereby summarily affirmed.

# United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

April 3, 1986.

**Before**

**Hon. WALTER J. CUMMINGS, Chief Judge**
**Hon. LUTHER M. SWYGERT, Senior Circuit Judge**
**Hon. JESSE E. ESCHBACH, Senior Circuit Judge**

**No. 85-1073**

**SUBURBAN O'HARE COMMISSION, et al.,**
*Petitioners,*

*v.*

**ELIZABETH HANFORD DOLE,** Secretary of the Department of Transportation, *et al.,*
*Respondents.*

Petition for Review of Orders of the Secretary of the Department of Transportation and the Administrator of the Federal Aviation Administration, and to Enforce Consent Decree.

## ORDER

On consideration of the petition and suggestion for a rehearing en banc of the above matter, no active member of the court requested any action on the suggestion for an en banc rehearing, and all members of the original panel have voted to deny said petition,

IT IS ORDERED that said petition for rehearing be and the same is hereby denied.

In the

# United States Court of Appeals

## For the Seventh Circuit

No. 85-1073

SUBURBAN O'HARE COMMISSION, et al.,

*Petitioners,*

*v.*

ELIZABETH HANFORD DOLE, Secretary of the Department of Transportation, et al.,

*Respondents.*

Petition for Review of a Decision of the Federal Aviation Administration and Department of Transportation.

ARGUED SEPTEMBER 27, 1985—DECIDED MARCH 13, 1986

Before CUMMINGS, *Chief Judge*, and SWYGERT and ESCHBACH, *Senior Circuit Judges.*

SWYGERT, *Senior Circuit Judge.* This case concerns the proposed expansion of Chicago's O'Hare International Airport. Petitioners are a group of municipalities situated near the O'Hare Airport and organized into the Suburban O'Hare Commission ("Suburban").[1] Respondents are the

[1] The communities are the Village of Addison, the Village of Bensenville, the City of Des Plaines, the Village of Elk Grove Village, the City of Elmhurst, the Village of Franklin Park, the Village of Harwood Heights, the Village of Itasca, the Village of Niles,

(Footnote continued on following page)

Department of Transportation, the Federal Aviation Administration ("FAA"), the City of Chicago, and various public officials including the Secretary of the Department of Transportation.

Suburban has petitioned this court to set aside the decision of the FAA approving Chicago's plan to expand the capacity of O'Hare and to enjoin all further construction at the location. For the reasons we now set forth the petition is denied.

## I

Located on a 6,925 acre site in Cook and DuPage counties seventeen miles northwest of downtown Chicago, O'Hare is one of three airports owned and operated by the City of Chicago.[2]

During World War II Douglas Aircraft manufactured C-54 transport planes for the United States Air Corps on the site of what is now O'Hare. The City purchased the Douglas facility for one dollar in 1945, and built the Orchard Place Airport on the site in 1946. In 1949 the facility was renamed for Edward "Butch" O'Hare, a Navy fighter ace and Congressional Medal of Honor recipient.

From 1926 to 1959 Midway Airport was the major airport of the Chicago area and the busiest airport in the world, but chronic congestion at Midway led to the City's decision to make O'Hare the area's major airfield. In 1959 the City began a massive expansion of O'Hare. By July 1962 most major air carriers had shifted operations to O'Hare. O'Hare was designed to accommodate twenty mil-

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[1] *continued*
the Village of Norridge, the City of Park Ridge, the Village of Schiller Park, and the City of Wood Dale. The combined population of these communities is estimated at 400,000. Lawrence C. Bieneman, a resident of the Village of Bensenville, is also a petitioner in this case.

[2] The other airports are Meigs Field and Midway Airport.

lion passengers annually, but currently approximately forty million passengers a year pass through the facility. The airport employs 35,000 people and is one of Chicago's largest employers.

Historically, aviation has been a closely regulated industry. In 1938, when commercial aviation was still in its infancy, Congress enacted the Civil Aeronautics Act. In 1958, in response to rapid and dramatic changes in the nature of aviation, Congress replaced the Civil Aeronautics Act with the Federal Aviation Act, 49 U.S.C. §§ 1301 *et seq.* (Chapter 20 of Title 49).

In 1946, to encourage the development of airports designed to accommodate interstate and international flights, Congress enacted the Federal Airport Act. This Act was superseded by the Airport and Airway Development Act of 1970. This legislation was in turn replaced by the Airport and Airway Improvement Act of 1982 ("AAIA"), 49 U.S.C. §§ 2201 *et seq.* (Chapter 31 of Title 49). Both the Federal Aviation Act and the Airport and Airway Improvement Act are administered by the FAA.

The Airport and Airway Development Act of 1970 made federal funds available to certain so-called "hub" cities to engage in a long-range planning process designed to produce an appropriate master plan for regional aviation development. In 1975, with funding provided by the FAA, Chicago hired Landrum & Brown, an aviation consulting firm, to prepare a Master Plan Study for O'Hare.[3] The study represented the first attempt to formulate a systematic plan of growth for O'Hare.

Landrum & Brown's Master Plan Study consists of nineteen volumes comprising thousands of pages and examines

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[3] The City retained O'Hare Associates as supervising consultants for the project. O'Hare Associates is a joint venture of partners from Murphy-Jahn (architecture), Envirodyne (engineering), and Schal Associates (construction). L&B was the original planner of O'Hare.

various factors relevant to airport development.[4] The consultants originally forecast a maximum unconstrained demand of 1.4 million flight operations in the Chicago area by 1995. Without significant expansion, Chicago's Midway Airport was projected to receive .3 million of those flights. Meigs Field was to receive .1 million flights. The remaining one million flights would somehow have to be accommodated at O'Hare. Landrum & Brown initially concluded that the projected demand could only be met by the construction of two new runways. This result was unacceptable to significant segments of the suburban population living near O'Hare. Conscious of the community opposition to the addition of new runways the City decided to limit the growth of O'Hare, in theory eliminating the need for the new runways until at least 1995. At the same time the City committed itself to accommodate at least a significant portion of the projected growth of the region's commercial aviation demand.

While the Master Plan Study was still in the preparation stage opponents of continued growth at O'Hare took their complaint to the courts. In 1974 then-State Attorney General William Scott sued the FAA in federal district court alleging that the agency had violated the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq.*, by adopting a policy of unlimited growth at O'Hare. *State of Illinois ex rel. Scott v. Butterfield*, No. 74 C 2440 (N.D. Ill. 1974). Suburban was permitted to intervene in the litigation. The *Butterfield* litigation ended on October 15, 1982, when the FAA, the City, and Suburban entered into a consent decree governing future growth at O'Hare. The consent decree provided in relevant part:

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[4] Using funds provided by the FAA, Suburban retained the consulting firms of Ralph Burke Associates and Bolt, Beranek & Newman, Inc. to furnish an independent review of the L&B MPS. Suburban's consultants gave favorable reviews to the L&B study. "Methodologies used by L&B for [aviation] forecasts and noise analysis are widely used and generally accepted by the airport community and federal agencies." Interim Report on Review of O'Hare Airport Master Plan, MPS Vol. XIX at B-2.

No. 85-1073

¶ 1a. All future development at O'Hare will comply with all then applicable requirements of Federal and State of Illinois laws requiring environmental analyses and processing.

. . .

¶ 1d. Chicago agrees that it will request the FAA to process an Environmental Impact Statement ("EIS") . . . with respect to any of the following projects (or projects similar in scale or purpose) at O'Hare: (i) Terminal 1 and related concourses and aprons; (ii) International Terminal; (iii) general aviation terminal; (iv) commuter concourse; (v) new air cargo facilities; (vi) construction of military replacement facilities; (vii) runway extensions. The FAA agrees that an environmental impact statement with respect to these projects will be processed to the extent the above projects fall within its jurisdiction. Chicago further agrees that it will not proceed with the construction of any or all of the projects listed in this paragraph 1d until an EIS is completed.

. . .

¶ 1f. Chicago agrees that the entire Master Plan development for O'Hare, including the projects identified in paragraph 1d above, will be presented to the FAA for Airport Layout Plan approval and the related environmental review as a single, comprehensive submission. Chicago agrees that the environmental assessment which it provides to the FAA and the public in connection with these projects will assess the impact of these projects on the assumption that the High Density Airports Rule will have been repealed.

¶ 1g. The FAA has not made any determination with respect to the matters described in Paragraphs 1e or 1f above, and this Decree does not bind the FAA with regard to any determination it may make respecting these matters.

The consent decree required the City to submit its airport development plans to the FAA in a single, comprehensive Airport Layout Plan, comporting with all relevant environmental provisions. The consent decree also formalized community involvement by establishing the O'Hare Advisory Committee, composed of representatives from both the community and government, as the appropriate forum for consideration of the relationship between O'Hare and its surrounding communities.[5] The consent decree further provided for the establishment of a permanent Office of Noise Abatement charged with investigating complaints about airport noise and with evaluating the effectiveness of noise abatement procedures.

The parties to the consent decree entered into a separate Intergovernmental Agreement which provided that the communities surrounding O'Hare would take "feasible and reasonable steps to discourage the further development of incompatible land uses around O'Hare." In return, the City agreed that it would employ a specified analytic model in measuring the impact on noise levels of O'Hare operations and that the resulting "noise map" prepared

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[5] Representation on the Advisory Committee was distributed as follows:

DuPage Mayors and Managers Conference (2)
North Central Council of Mayors (2)
North West Municipal Conference (2)
Suburban O'Hare Commission (1)
Cook County Board of Commissioners (1)
DuPage County Board of Commissions (1)
Chicago Association of Commerce and Industry (1)
Air Transport Association (1)
Federal Aviation Administration (1)
Northeastern Illinois Planning Commission (1)
Illinois Department of Commerce and Community Affairs (1)
Illinois Department of Transportation (1)
Chicago Department of Aviation (1)
Office of the Mayor, City of Chicago (1)

by the City would be based on a 65 Ldn Contour.[6] Chicago represented that it would not seek a finding of no significant environmental impact by the FAA.

After the signing of the consent decree the City continued to review its plans for redevelopment of O'Hare. The O'Hare Master Plan originally called for a three-phase development schedule.[7] As a result of the *Butterfield* litigation the City adopted a two-phase development plan. Phase I of the two-phase plan primarily involved the construction of a fourth terminal and an associated Concourse L. Phase II is a much more ambitious undertaking. According to the notice of intent published on November 26, 1982 in the Federal Register, the following projects are contemplated:

Extension of Runways 27R, 32L
Construction of second taxiway bridge
Construction of new taxiways
Relocation of the inner/outer terminal area taxiway
New apron construction
Construction of snow removal facilities
Acquisition of the military site and demolition and replacement of existing USAF facilities
Construction of a new International Terminal and Concourse
Expansion of existing terminal buildings
Construction of a new Terminal 1 and new concourses B/C
Construction of a new general aviation facility
Construction of new cargo complex

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[6] The 65 Ldn contour delineates the area within which aircraft noise exceeds 65 decibels, as measured on the Day-Night Average Sound Level scale. That scale reflects the number, duration, and intensity of noise "events." The Ldn scale weighs night-time noise ten times as heavily as the same absolute amount of day-time noise, reflecting the fact that people perceive noise as more intrusive during the night.

[7] Phase I was to begin in 1982-83; Phase II included development in 1983-87; and Phase III covered all development past 1987.

Expansion of the heating and refrigeration plant
Terminal area roadway improvements
Airport ground access improvements
Construction of a new post office facility
People mover systems
Parking facilities

The official estimated cost of all the development projects is $840 million, Rec. Vol. I, at 1028, but the record is replete with much higher estimates and petitioners have placed the total cost at approximately $1.5 billion. Less than five percent of the development is to be federally financed. Most of the funding will come from General Airport Revenue Bonds issued by the City, Rec. Vol. I, at 30. Those bonds will be repaid by fees and charges imposed on airlines using O'Hare.

Public hearings were held on the matter in December 1982. The City began receiving written comments concerning the proposed development plans soon thereafter. Suburban, for instance, submitted written comments on January 11, 1983, Rec. Vol. I, at 173. Typically, the written comments raised questions about the impact on the environment of the proposed expansion plans.

## II

NEPA mandates that federal agencies undertaking "major federal actions significantly affecting the quality of the human environment" must submit an Environmental Impact Statement ("EIS"). It is not contested that the City has requested and will receive at least $43 million in federal funding bringing the expansion plans for O'Hare within NEPA's ambit. An EIS must provide a "detailed statement" on:

(1) the environmental impact of the proposed action,

(2) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(3) alternatives to the proposed action,

(4) the relationship between local short-term uses of man's environment and the maintenance and enhancements of long-term productivity, and

(5) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. 42 U.S.C. § 4332 (2)(C).

FAA Order 5050.4 states that an Airport EIS should consider the following:

Purpose and Need for the Action
Alternative
Affected Environment
Environmental Consequences
- Noise
- Land use
- Social impacts
- Induced socio-economic impacts
- Air quality
- Water quality
- DOT Section 4(f) lands
- Historic sites
- Biotic communities
- Design, art and architectural applications
- Endangered species of flora and fauna
- Wetlands
- Floodplains
- Prime and unique farmlands
- Energy
- Light emissions
- Solid waste
- Construction Impacts
- Adverse Impacts which Cannot be Avoided

The City determined that "Noise, Land use, Water quality, Air quality, and Construction impacts" should receive the greatest attention in the O'Hare EIS, Rec. Vol. I, at 141. The EIS in this case was prepared in stages and reflects the contributions of many individuals and organizations including the petitioners. A preliminary draft of the

EIS, prepared by the City, was completed by February 1983; a formal draft of the EIS, was submitted in June 1983. The final EIS processed by the FAA using data furnished by the City was completed in May 1984. Because the environmental issues raised by the O'Hare expansion plans had always been the most controversial element of the Airport Layout Plan, FAA completion of the final EIS cleared the way for approval of the Plan, which came on November 14, 1984.[8] In July 1984 in response to comments from the Environmental Protection Agency the FAA developed a program of air quality mitigation measures.

On December 4, 1984 Suburban filed suit in the United States District Court for the Northern District of Illinois against the FAA and the City alleging that the approval of the Airport Layout Plan violated the *Butterfield* consent decree, NEPA, the Airway and Airport Improvement Act, and the Clean Air Act, 42 U.S.C. §§ 7401 *et seq.* Suburban moved for a preliminary injunction to enjoin all further construction at O'Hare. The district court dismissed the complaint finding that it lacked subject matter jurisdiction over the complaint. *Suburban O'Hare Commission v. Dole*, No. 84 C 10387, Memorandum Opinion and Order (N.D. Ill. Feb. 28, 1985). Prior to the district court's dismissal, Suburban, as a matter of protective pleading, filed the present petition for review in this

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[8] A cost-benefit analysis is not required of an EIS, but one was prepared in this case although it was not included in the final EIS. Master Plan Study, Vol. XI, at V-2. Under the Council on Environmental Quality's regulations governing the implementation of NEPA, an EIS need not include a formal cost-benefit analysis. 40 C.F.R. § 1507.23. "The statement is sufficient if it gives the decisionmaker and other readers enough detail concerning all of these costs and benefits to permit reasoned evaluation and decision." *South Louisiana Environmental Council v. Sand*, 629 F.2d 1005, 1013, n.7 (5th Cir. 1980); *Sierra Club v. Sigler*, 695 F.2d 957, 976-77, n.15 (5th Cir. 1983). A formal cost-benefit analysis need be included in the EIS itself only if the agency relies on such analysis in reaching the decision to which the EIS relates. 40 C.F.R. § 1510.23.

court on January 14, 1984. It is that petition for review that is before us. Technically, the petition for review asks us only to review the legality of the FAA's approval of the Airport Layout Plan. As we have indicated, however, the Plan incorporates by reference all relevant environmental requirements. In effect, therefore, we are also asked to rule upon the adequacy of the final EIS.

## III

A threshold issue we must address before reaching the merits of Suburban's claim is whether jurisdiction properly vests in this court, as respondents contend, or in the district court, as petitioners urge. We have been assisted in our consideration of this matter by the thoughtful opinion of the district court dismissing Suburban's complaint. We point out, however, that the proceeding below is jurisdictionally distinct from the present petition for review in this court and that the district court's decision is not under review by this court.

The FAA has stated that its review of the Master Plan Study and Airport Layout Plan was conducted under parts 77, 139, 152, and 157 of FAA regulations codified at 14 C.F.R. The FAA's review pursuant to 14 C.F.R., parts 77, 139, and 157, was conducted pursuant to authority vested in the FAA under Chapter 20 of Title 49. The FAA's review pursuant to part 152 of 14 C.F.R. was conducted pursuant to authority of Chapter 31 of Title 49.

49 U.S.C. § 1486(a) provides that:

> (a) Any order, affirmative or negative, issued by the Board or Administrator under this chapter, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 1461 of this title, shall be subject to review by the court of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expira-

> tion of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

49 U.S.C. § 1486(d) declares that the courts of appeals shall have exclusive jurisdiction to affirm or set aside an order of the FAA issued pursuant to this section. Thus, if the FAA order approving the ALP was, in fact, made pursuant to Section 1486 it is clear that exclusive jurisdiction to review that order rests with this court. *Gaunce v. deVincentis*, 708 F.2d 1290 (7th Cir. 1983); *City of Aurora v. Hunt*, 749 F.2d 1457 (10th Cir. 1984); *City of Alexandria v. Helms*, 728 F.2d 643 (4th Cir. 1984); *State of New York v. FAA*, 712 F.2d 806 (2d Cir. 1983); *City of Rochester v. Bond*, 603 F.2d 927 (D.C. Cir. 1979).

Suburban advances three arguments in support of its contention that the FAA's order of November 14, 1984 is reviewable only in the district court. First, Suburban contends that the FAA's decision was actually made pursuant to Chapter 31 of Title 49. Second, Suburban asserts that the district court had jurisdiction over its claim by virtue of the *Butterfield* consent decree. Third, Suburban argues that the FAA decision is not an "order" for purposes of Section 1486 because the administrative record is based on disputed issues of fact subject to the general jurisdictional grant of 28 U.S.C. § 1331.

Of the four "orders" entered by the FAA as part of its November 14, 1984 decision, three were issued on the purported authority of Chapter 20 of Title 49. One order was issued on the authority of Chapter 31. When an agency decision has two distinct bases, one of which provides for exclusive jurisdiction in the courts of appeals, the entire decision is reviewable exclusively in the appellate court. In *Gaunce*, 708 F.2d 1290, for example, a pilot challenged the FAA's order revoking her flight certificate. The challenge was based on both the Federal Aviation Act and the United States Constitution. The court nonetheless held that exclusive jurisdiction rested in the court of appeals.

To permit Suburban to maintain this action in the United States district court would contravene the clear intention of Congress that agency decisions made under Chapter 20 be reviewed by courts of appeals. The separation of Chapter 20 claims from Chapter 31 claims in this case could only be effectuated through bifurcated proceedings. But the purpose of having agency decisions reviewed by courts of appeals is to avoid duplicative factfinding. If there is any ambiguity as to whether jurisdiction lies with a district court or with a court of appeals we must resolve that ambiguity in favor of review by a court of appeals. If a decision of an administrative agency is based, in substantial part, on a statutory provision providing for exclusive review by a court of appeals, then the entire proceeding must be reviewed by a court of appeals. We need not reach the question of what constitutes "substantial part" where, as here, three of the four orders in question were issued under 49 U.S.C. § 1486. In the absence of a clear indication that an alternative basis of jurisdiction was intended, we must presume that Section 1486 (Chapter 20) applies.

Although a violation of a consent decree is primarily a breach of contractual obligations, federal courts, both trial and appellate, may enforce such decrees under the doctrine of ancillary federal jurisdiction. The interpretation of a consent decree is a matter of law and subject to plenary review on appeal. *United States v. Board of Education of City of Chicago*, 717 F.2d 378, 382 (7th Cir. 1983).[9]

We do not question the inherent authority of district courts to enforce settlement agreements terminating litigation pending before them, *see McCall-Bey v. Franzen*, No. 85-2415 (7th Cir. Nov. 13, 1985), but it is not clear that

[9] Suburban did not file a motion to enforce the consent decree. Instead, it filed an entirely new complaint. Suburban argued that it had been misled by the clerk of the district court into filing a new claim. That allegation was rejected by the district court.

the consent decree in this case creates unfulfilled substantive obligations on the part of the City and the FAA. The parties to the *Butterfield* litigation agreed to a particular procedural format, that is, a specific method of dispute resolution. The FAA and the City have complied with the terms of the consent decree, and a motion to enforce the consent decree in the district court, at this stage of the proceedings, would serve no useful purpose.

To a certain extent the jurisdictional problem posed by this case is one of characterization. The FAA need not have characterized its decision as one made pursuant to its authority under Section 1486. It might have issued its order under the authority of the Airport and Airway Improvement Act. But since the FAA chose to rely on Section 1486, petitioners are effectively foreclosed from pursuing their claims in the district court. Congress has not provided us with a mechanism for determining whether a decision by the FAA to characterize its order as one made under Section 1486 is genuine or not.

Suburban lastly contends that jurisdiction does not properly lie with this court because there are disputed issues of fact regarding the scope and the content of the administrative record which must be resolved in the district court. The asserted gross inadequacy of the administrative record, Suburban contends, suggests that the November 14 decision is not an "order" for purposes of Section 1486. We have previously stated that Section 1486 dictates a broad construction of what constitutes an "order." *Sima Products v. McLucas*, 612 F.2d 309, 312-14 (7th Cir.), *cert. denied*, 446 U.S. 903 (1980). *See also State of New York v. FAA*, 712 F.2d at 808. The existence of a reviewable administrative record is the determinative element in defining an FAA decision as an "order" for purposes of Section 1486. *City of Alexandria*, 728 F.2d at 646. "If the FAA's record were inadequate to permit review directly in the court of appeals, we would be inclined to find that the action, although final, is not an order within the meaning of [Section 1486]. However, we are not presented with that situation here." *Sima Products*, 612 F.2d at 314 (citations omitted).

Suburban argues that if this court exercises jurisdiction over the petition for review it must apply the judicial review provisions of the Administrative Orders Review Act (the Hobbs Act), 28 U.S.C. § 2347(b). That Act provides that where the agency is not required to hold a hearing and has, in fact, not held a formal hearing, and when the pleadings present genuine issues of material fact, the case must be sent to the district court for a trial *de novo*. 28 U.S.C. § 2347(b)(3).

This is a novel argument. No reported case has applied the Hobbs Act to FAA final orders. There is no indication that Congress intended the Act to apply to any agency other than the five enumerated in the statute. There is ample evidence indicating that Congress intended for decisions of the FAA to be reviewed solely under Section 1486.

## IV

Before turning to the merits of this case we must also announce our standard of review of FAA decisions. Section 1486 provides that "findings of fact" by the FAA "if supported by substantial evidence, shall be conclusive." In this case no formal hearings were conducted by the agency. Instead, the FAA received written submissions and conducted numerous nonadversary, informal proceedings. Two circuits have held that appellate review of informal agency action under Section 1486 is governed by an "arbitrary and capricious" standard of review. *Rombough v. FAA*, 594 F.2d 893, 896 (2d Cir. 1979); *Tiger International v. CAB*, 554 F.2d 926, 935-36 (9th Cir.), *cert. denied*, 434 U.S. 975 (1977). In *Starr v. FAA*, 589 F.2d 307, 310 (7th Cir. 1978), this court appeared to apply an abuse of discretion standard to review of informal FAA action under Section 1486. In *Aircraft Owners & Pilots Assoc. v. FAA*, 600 F.2d 965, 969-72 & n.28 (D.C. Cir. 1979), however, the court held that informal FAA action made on the authority of Section 1486 should not be overturned unless it is unsupported by substantial evidence. Similarly, in *State of South Dakota v. CAB*, 740 F.2d 619,

621 (8th Cir. 1984), the court held that a Civil Aeronautics Board decision under Section 1486 "based upon factual consideration drawn from an informal, nonadversarial record consisting of information and comments submitted by opposing sides and interested parties" should be reviewed under a substantial evidence standard. We agree with the Eighth Circuit and District of Columbia Circuit that the substantial evidence test is the appropriate standard of review of FAA action under Section 1486. The fact that the agency findings in this case were the product of an informal information-gathering process does not affect our standard of review. Congress has indicated that the substantial evidence test is the proper standard for all FAA decisions under Section 1486. *See also White Industries v. FAA*, 692 F.2d 532 (8th Cir. 1982); *Pillai v. CAB*, 485 F.2d 1018, 1023 (D.C. Cir. 1973) (applying substantial evidence standard); *Law Motor Freight v. CAB*, 364 F.2d 139, 144 (1st Cir. 1966).

*Rombough*, *Tiger International*, and *Starr* were proceedings requesting exemptions from a valid agency rule. Those cases relied heavily on *Camp v. Pitts*, 411 U.S. 138 (1973), which distinguished between the standard of review under the Administrative Procedure Act ("APA") of agency action taken after a formal hearing and agency action taken without a formal hearing. Under the APA the substantial evidence test is only appropriate when reviewing findings made on a hearing record. 5 U.S.C. § 706(2)(E); *Camp*, 411 U.S. at 141. The appropriate standard of review of informal agency action under the APA is whether the action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706 (2)(A); *Camp*, 411 U.S. at 142. The obvious difficulty with the rationale of those cases reviewing informal FAA decisions under the "arbitrary and capricious" or "abuse of discretion" standards is that the APA is clearly not applicable to FAA action under Section 1486. Both *Tiger International*, 554 F.2d at 935-36, and *Rombough*, 594 F.2d at 896, acknowledge that their reliance on *Camp* and the APA is by analogy only. But the argument by analogy is neither persuasive nor necessary where, as here, Con-

gress has created a special review provision specifically designed to address precisely the type of case before the court. The specific review provisions of Section 1486 take precedence over the general provisions of the APA. *Rombough*, 594 F.2d at 895-96.

In addition, we note that *Tiger International*, *Rombough*, and *Starr* all involved requests for exemptions from valid agency rules. All three courts were concerned with the administrative and practical difficulties of applying a substantial evidence test to a petition for exemption. In *Starr*, for example, the court noted that:

> In proceedings requesting exemptions from a valid agency rule . . . the bulk of evidence is petitioner's, since he must show that circumstances justify an exemption in his case. And if an agency's decision to grant or deny an exemption were to be judged under a substantial evidence rule, that agency would be forced to defend its standard rule in every exemption proceeding.

589 F.2d at 311. In the instant case these concerns are nonexistent. The FAA in this case is not articulating a standard rule and the bulk of the evidence is not petitioners'. We note that the facts in *Aircraft Owners & Pilots Association* and *State of South Dakota v. CAB*, like those in this case, also involved FAA approval of a specific construction project.

In *Association of Bank Travel Bureaus v. Board of Governors*, 568 F.2d 549 (7th Cir. 1978), this court was called upon to determine the applicable standard of review of decisions of the Board of Governors of the Federal Reserve System under 12 U.S.C. § 1848 which, like 49 U.S.C. § 1486, provides for exclusive review in the courts of appeals and states that administrative findings shall be conclusive if supported by "substantial evidence." The court held, however, that where the board engaged in rulemaking "which did not involve findings required by statute to be made or the record after opportunity for an agency hearing," 568 F.2d at 552, the "arbitrary and capricious" standard is the proper standard of review.

*Association of Bank Travel Bureaus* does not control this case. Aside from the obvious distinction that this earlier case involved the interpretation of a different statute, the decisionmaking processes of the FAA in this case are sufficiently unlike the decisions of the Board of Governors in *Association of Bank Travel Bureaus* to warrant our invocation of a substantial evidence rule. The "informality" of the FAA decisionmaking process is less important to our decision than the fact that petitioner's views were represented at virtually every stage of the decisionmaking process. The arbitrary and capricious standard of the APA is designed to protect agency decisions made without the benefit of a complete record compiled in an adversarial or quasi-adversarial proceeding. The lengthy and elaborate decisionmaking procedures preceding the FAA's November 14 decision in this case are not the sort of informal processes the drafters of the APA had in mind when they adopted the arbitrary and capricious standard of review.

We realize that our decision appears to conflict with *Tiger International* or *Rombough* or *Starr*, "but we see no inconsistency between them and our treatment of the factually distinguishable case presently before us." *Tiger International*, 554 F.2d at 936, n.19. In the absence of any other direction from Congress and in the absence of the special concerns evident in the facts of those cases, we must apply the plain language of Section 1486.

## V

Having concluded that jurisdiction properly lies with this court and having clarified the standard of review we turn finally to the merits of the petitioners' claims. The FAA Record of Decision reports that the EIS submitted by the City and approved by the agency considered five alternatives to the proposed development: (a) alternative modes of travel; (b) utilization of other airports; (c) development of a new airport; (d) alternative levels of aviation demand; or (e) do nothing. The City rejected the possibility that

alternative modes of travel such as rail, bus, or automobile could satisfy the needs of the majority of travelers. The City also rejected the option of doing nothing because inaction would decrease the efficiency of flight operations while simultaneously increasing the level of noise and air pollution. Suburban does not dispute either of these conclusions. In addition, the City and Suburban agree that there must be some external limits imposed on the level of aviation demand at O'Hare. They disagree, however, where those limits should be set and on whether the proposed development plan represents an adequate limitation on growth of O'Hare flight operation demand.

The primary area over which the petitioners disagree with the City and the FAA is the adequacy of the respondents' consideration of the possibility of utilizing other airports or constructing a new airport in order to alleviate some of the demands on O'Hare. The discussion of these alternatives in the FAA Record of Decision is brief.

> *Utilization of Other Airports.* The only airport that currently provides commercial air carrier service to the Chicago Metropolitan Area is Midway Airport which is being improved to accommodate a limited increase in service to selected cities, but cannot be adequately expanded to handle the increased demand and needs of the Chicago Metropolitan Area. The Greater Rockford Airport and General Mitchell Field in Milwaukee are too distant for most Chicago area travelers and are not suitable alternatives.
>
> *Development of New Airport.* Development of a new major air carrier airport was considered several times in the past, as well as in the recently completed Master Plan Study. This alternative was not selected because of difficulties in finding a suitable site, and the long lead time to make it operational. Development of another air carrier airport to serve the Chicago Metropolitan Area will be studied again as part of a State System Plan to be prepared by the Illinois

> Department of Transportation under a series of grants to be funded by the FAA's Airport Improvement Program. The initial grant was issued in September 1984.

Petitioners allege that these terse statements are completely inadequate and unsupported by substantial evidence. The Record of Decision, however, represents merely a summation of a voluminous, multi-year inquiry into the proposed development plan. The Record of Decision incorporates by reference the years of planning that preceded it. Our task as an appellate court is to determine whether the FAA's decision was based on substantial evidence, and the evidence we must evaluate consists of the entire administrative record. Of course, the size of the record is not the determinative factor, but rather its comprehensiveness and the inherent reasonableness of the ultimate determination.

Petitioners point out that perhaps half of the airline passengers flying into O'Hare arrive merely to transfer onto another flight taking them to their final destination. They suggest that these transfer passengers could somehow be shifted to other airports obviating the need for new construction at O'Hare.

Petitioners' argument presupposes that the City has some degree of control over transfer passengers. But no effective means of separating those passengers who intend to stay in Chicago for more than a few hours or days from those who are merely passing through has been suggested. O'Hare is the busiest airport in the world because airlines and air travelers find O'Hare to be the most convenient or necessary place to travel to and away from and to make transfers to connecting flights. Moving air traffic to Milwaukee or Rockford or anywhere else is simply not within the power of the City to accomplish. The decision to make O'Hare, or any other airport, a "hub" airport belongs to the airlines and not to the Government. The City could consciously choose to do nothing about conditions at O'Hare and permit the congestion and delays to reach such an intolerable level that airlines would be forced

to send flights to other cities. But the City cannot direct the resulting overflow to any particular location. Nor is there any guarantee that the shift away from O'Hare would occur quickly or without massive inconvenience to air travelers. In addition, no one has calculated the impact of a significant increase in flight operations in the airports receiving flights that once went to O'Hare or the damage to the environment of the communities surrounding those airports; such calculations are not required by federal law. Moreover, the City has already opted for a limited growth option forebearing to build any new runways until 1995. Shifting flight operations might have merit ideally, but a decision by the FAA that such a shift is not possible or practical is amply supported by the record.

A shift of flight operations to Chicago-owned Midway Airport raises fewer of the problems that shifts to other airports in other cities do. Several cities already have two major airports. New York, for instance, has both LaGuardia and Kennedy. But Midway has even less available space than O'Hare and is situated in an area as densely populated as the area around O'Hare. Upgrading Midway to the point that it would eliminate the need to expand O'Hare would entail enormous costs. Moreover, the City has already proposed to add significantly to Midway's capacity.

Another possible solution to the problem of congestion at O'Hare is to construct an entirely new airport. Just as O'Hare replaced Midway as the primary airport in the area, a new airport could replace O'Hare as the principal air travel facility. There are obvious difficulties with this idea. This new airport will presumably have to be at least as large as O'Hare. This means that a site with more than seven thousand acres of undeveloped land will have to be acquired. This land will have to be reasonably close to the central city in order to make commuting acceptable. But Chicago is literally surrounded by sprawling and populous suburbs. Locating thousands of acres of underutilized land would be no easy task. In addition, the building of a new airport would be the most expensive of all possible solutions to the O'Hare problem. A new airport would

require years to construct and would have a difficult time passing environmental requirements. Moreover, the City and the FAA are already in the midst of a formal study of the possibility of building a new airport in the Chicago area. A new airport may or may not be the best long-term solution to the problems of airport travel in and out of Chicago, but the City and the FAA needed to formulate a plan to deal with the short-term problems at O'Hare. The proposed development represents a reasonable response to those problems though one unable to satisfy everyone affected.[10]

Apart from objections to the FAA's consideration of alternatives, Suburban challenges the treatment of the substantive environmental requirements of both NEPA and the Clean Air Act. Those challenges can be characterized as criticisms of the methodology employed by the FAA in measuring projected increases in noise levels and decreases in air quality. Suburban, for instance, quarrels with the FAA's decision to calculate the noise impact of the proposed development on the basis of the relatively quieter jets now being introduced into commercial aviation service. But this particular decision of the FAA appears to us to be reasonable. Moreover, "[i]t is clearly within the expertise and discretion of the [FAA] to determine proper testing methods." *Sierra Club v. United States Dep't of Transportation*, 753 F.2d 120, 128 (D.C. Cir. 1985). Suburban's objections to the methodology and conclusions of the FAA's procedures do not begin to establish that those procedures were not based on substantial evidence.

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[10] Two previous studies of proposals for a third airport have been undertaken. One study examined the possibility of constructing a new airport on landfill in Lake Michigan. Another study considered the possibility of building a new airport in northeast Indiana. Both studies were made available to the FAA and the City. A legislative task force was recently appointed to examine the environmental consequences of further expansion at O'Hare and the feasibility of constructing a new airport.

Suburban also alleges that FAA approval of the Airport Layout Plan violates section 176(c) of the Clean Air Act, 42 U.S.C. § 7506(c). Under the Clean Air Act the EPA is required to establish national ambient air quality standards. 42 U.S.C. § 7409. Each state must develop its own implementation plan designed to achieve the national air quality standards. 42 U.S.C. § 7410. Private citizens may bring suit only for violations of the state plans and not the national standards. 42 U.S.C. § 7604. *See Council of Committee Organizations v. Metropolitan Transportation Authority*, 683 F.2d 663 (2d Cir. 1982). The FAA found that the Plan will not violate the Illinois implementation plan. Rec. Vol. VI, at 1679-80. Moreover, the FAA approved the ALP subject to the City's agreement to take steps to mitigate the impact on air quality. The City's compliance with this condition will be monitored by the FAA, the EPA, and the Illinois EPA. Rec. Vol. IV, at 1731-33. Under these circumstances we do not find that a violation of the Clean Air Act has occurred.

We do not suggest that our brief discussion of the difficult choices confronting the City and the FAA represents an exhaustive inquiry into the data, methodology, and calculations of the planners of the O'Hare expansion. But neither is such an inquiry required.

> NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural. . . . It is to insure a fully informed and well-considered decision, not necessarily a decision the judges of the Court of Appeals . . . would have reached had they been members of the decision-making unit of the agency. Administrative decisions should be set aside in this context, as in every other, only for substantial procedural or substantive reasons as mandated by statute, . . . not simply because the court is unhappy with the result reached.

*Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 558 (1978).

It is axiomatic that reviewing courts should not substitute their judgments for those of an agency as to the environmental consequences of its actions. *Kleppe v. Sierra Club*, 427 U.S. 410, n.21 (1976). Our role is to ensure that the FAA has taken a "hard look" at the environmental consequences of its action. *Id.* "A reviewing court determining whether the factual findings of the agency are based on substantial evidence weighs the evidence in the record supporting the decision against that which is contradictory. As long as sufficient evidence exists that a reasonable mind might accept as adequate to support a conclusion, the agency's findings must be upheld." *Aircraft Owners & Pilots Ass'n*, 600 F.2d at 970 (citations omitted). When measured against this deferential standard, the FAA's decision to approve the Airport Layout Plan was clearly reasonable and clearly supported by substantial evidence.

Suburban alleges that the City and the FAA have kept "two sets of books" regarding the Master Plan decision-making process. The key element of the Master Plan is the twenty-year forecast of "metropolitan aircraft operations demand." Prior to the settlement of the *Butterfield* litigation in 1982 the City forecast an operations demand for the entire Chicago area of 943,000 flights for 1980; 1,064,500 flights for 1985; 1,234,500 flights for 1990; and 1,412,000 flights for 1995. Those estimates were based on 853,000 actual flights in 1974. O'Hare's capacity was estimated at 950,900 flights. Petitioners refer to this data as "the first set of books."

In 1983 the twenty-year metropolitan forecast was revised and this revision was employed in the final EIS and the FAA's Record of Decision. The 1983 revised forecast estimated O'Hare's capacity at 840,960 operations. The City estimates that the completion of Phase II will enable O'Hare to handle 920,000 annual operations in 1995. Without the project the City estimates 840,900 operations would occur in 1995. Petitioners refer to this revised forecast as the "the second set of books." In essence, Suburban contends that this alleged second set of books was invented by the City in order to conceal the deficiencies in the Master

Plan made evident by the alleged "first set of books." Specifically, petitioners contend that "data, methodologies and calculations" for several key elements of the "second set of books" are "missing."

We confess to being somewhat mystified by Suburban's argument. There is nothing missing from the administrative record. All the "data, methodologies and calculations" of the "first set of books" can be found in the MPS. In fact, petitioners' brief cites to the appropriate sections of that study in its brief identifying the key elements of the "first set of books."

Suburban attempts to drive an artificial wedge between the so-called first and second set of books—a wedge presumably created by the improper desire of the City to mislead petitioners. But it appears far more likely that the 1983 revised estimate of O'Hare's capacity was the result of a tardy recognition on the part of the City that a policy of unlimited expansion at O'Hare was not politically feasible nor environmentally wise. The *Butterfield* litigation and the activities of petitioners were no doubt instrumental in this realization. The FAA's Record of Decision notes that: "The City of Chicago decided to pursue a constrained development for O'Hare that would limit the future growth to that which could be handled by the existing runways and available land and by assuming improved air traffic control capabilities to accommodate increased operations." The FAA's approval of the Airport Layout Plan is clearly predicated on the City's decision not to add new runways to O'Hare. New runway construction would entail a new environmental review. It is obvious that Suburban simply does not believe that the City intends to keep its word. But the City has represented to this court and to the FAA that it has no plans to build any new runways at O'Hare. Neither the FAA nor this court is in a position to gauge the sincerity of the City's promises. Chicago has gone on record and if it breaks its promises, it will certainly find itself again in court.

Suburban also alleges that the FAA's November 14, 1984 Record of Decision violates the Airport and Airway

Improvement Act. We agree with the district court that contrary to respondents' contentions the Act applies to the O'Hare expansion plans. But Suburban has not established a violation of that Act.

The Airport and Airway Improvement Act requires an airport construction project receiving federal funds to be "reasonably consistent" with existing development plans for the area surrounding the airport. 49 U.S.C. § 2208 (b)(1)(A). The final EIS evidences great concern for the impact of the proposed development on the surrounding communities. The entire decisionmaking process in this case belies the contention that the FAA has ignored the development concerns of the area around O'Hare. We point out that the Northeastern Illinois Planning Commission, a state agency overseeing planning for the area of the State in which O'Hare is located, concluded that the proposed project was "consistent with plans and policies of the Commission." M.P.S., Vol. XVI, at B-17.

Suburban also contends that the FAA was required by the Airport and Airway Improvement Act to obtain a governor's certificate before approving the Airport Layout Plan. 49 U.S.C. § 2208(b)(7)(a) provides that no application for federal funds for "a project involving airport location, a *major* runway extension, or runway location" shall be approved unless the governor of the state in which the project is located certifies that there is a "reasonable assurance" that the project will comply with applicable air and water quality standards.

Suburban contends that the Airport Layout Plan contemplates two "major runway extensions." Runway 27R and runway 32L are, in fact, to be extended under Phase II of the project. The FAA, however, contends that these are not "major" extensions for purposes of the Airport and Airway Improvement Act. FAA Order 5050.4 defines a major extension as one that will permit the accommodation of aircraft three decibels louder than those currently using the runway. The FAA has determined that the proposed runway extensions will account for only a one decibel increase. "An agency's interpretation of the statute

it must administer is ordinarily accorded great deference." *Illinois Commerce Commission v. ICC*, 749 F.2d 875, 880 (D.C. Cir. 1984). We cannot say that the FAA's determination that the runway extensions contemplated by the ALP are not "major" is unreasonable.[11]

Finally, we feel compelled to address the equities of this case. Petitioners conceive of themselves as the innocent, passive victims of a relentlessly expansive O'Hare. They point out that many of the communities surrounding O'Hare were established long before the airport had been built. In all fairness, however, these same communities receive enormous economic benefits from their proximity to O'Hare. Moreover, many of these communities have resisted attempts by the City to harmonize their own land-use regulations with the aviation activity at O'Hare. In a perfect world, petitioners would be able to reap the benefits of their location and still be able to sleep without noise disturbances at night. Unfortunately, the FAA and the City are forced to operate in a world where even their most carefully considered decisions are likely to adversely affect some people. We are confident that the proposed development represents an honest and careful attempt to minimize those consequences and to accommodate the conflicting interests in the best possible manner.

A true Copy:

Teste:

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*Clerk of the United States Court of Appeals for the Seventh Circuit*

[11] In view of our disposition of the petition, we need not consider whether an injunction would have been an appropriate remedy in this case had petitioners been entitled to some relief. Nor need we consider respondents' motion to strike petitioners' affidavits. We have considered Suburban's remaining arguments and find them to be without merit.

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603 F.Supp. 1013

**SUBURBAN COMMISSION; The Village of Addison; The Village of Bensenville; The City of Des Plaines; The Village of Elk Grove Village; The City of Elmhurst; The Village of Franklin Park; The Village of Harwood Heights; The Village of Itasca; The Village of Niles; The Village of Norridge; The City of Park Ridge; The Village of Schiller Park; The City of Wood Dale; and Lawrence C. Bieneman, Plaintiffs,**

v.

**Elizabeth Hanford DOLE, Secretary of the Department of Transportation; Russell A. Olson, Regional Representative of the Department of Transportation, Region V; Donald Engen, Administrator of the Federal Aviation Administration; Paul Bohr, Director, Great Lakes Region, Federal Aviation Administration; John Guidotti, Supervisor, Illinois Section, Chicago Airports District Office, Federal Aviation Administration; The City of Chicago, a municipal corporation; and Thomas Kapsalis; Commissioner of the Department of Aviation of the City of Chicago, Defendants.**

**No. 84 C 10387.**

United States District Court,
N.D. Illinois, E.D.

Feb. 28, 1985.

## MEMORANDUM OPINION AND ORDER

ROVNER, District Judge.

Plaintiffs consist of numerous suburban municipal entities surrounding O'Hare International Airport ("O'Hare"), the Suburban O'Hare Commission, an organization of Illinois Municipal corporations created in 1982 for the purpose of

protecting its members and their citizenry from environmental damage caused by O'Hare, and Lawrence C. Bienemann, a private citizen of one of the plaintiff villages.[1] The defendants are various officials and employees connected with the Federal Aviation Administration ("FAA"), the Department of Transportation, and the City of Chicago and Chicago itself as a municipal corporation ("City defendants"). In its complaint, filed in this Court on December 4, 1984, Suburban O'Hare challenges an adjudicatory decision of the FAA rendered on November 14, 1984 by which the FAA approved Chicago's 20-year "Master Plan" for the construction and operation of commercial air carrier facilities for the metropolitan Chicago area to meet long-term aircraft operations demand at air carrier airports. The FAA not only approved the expansion of aircraft operations at O'Hare, but also rejected other [**1015**] alternatives to handle the 20-year demand which would not increase operations at O'Hare.[2]

Suburban O'Hare's complaint consists of 78 pages, 188 enumerated paragraphs, and 6 exhibits, some of which are lengthy in themselves. Although a detailed explanation of the complaint is not necessary for purposes of this Opinion, some discussion of the history and background of this case, as alleged by plaintiffs in their complaint, is helpful to an understanding of its present procedural posture.

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[1] In this Opinion, the plaintiffs will be referred to collectively as "Suburban O'Hare."

[2] The rejected alternatives set forth in the November 14, 1984 FAA decision are: a) consideration of "alternative modes of travel" (e.g., rail, bus, and automobile); b) "utilization of other airports" (e.g., General Mitchell Field in Milwaukee, Wisconsin); c) the "development of a new airport" in the Chicago area; d) consideration of "alternative levels of aviation demand;" and e) "Do Nothing." (Record of Decision, Complaint, Exhibit 4 at pp. 4-5.)

*Background*

The FAA's November 14, 1984 decision was the culmination of a dispute that began many years before and resulted, in part, from the procedural decision-making framework created by a Consent Decree entered by Judge Stanley J. Roszkowski of the United States District Court for the Northern District of Illinois on October 14, 1982 in the case of *State of Illinois ex rel. Scott v. Butterfield,* No. 74 C 2410 ("*Illinois v. Butterfield* litigation"). According to the complaint, for many years the mayors and city councils of the plaintiff communities had asked for reduction in the noise and air pollution emanating from O'Hare. Suburban O'Hare alleges that instead of addressing these problems, the City defendants and the FAA had been following a piecemeal approach to the physical development of O'Hare which led to the ever-increasing expansion of O'Hare's capacity to accommodate flight operations far beyond its original design. Because the FAA awarded financial grants to Chicago for the construction of individual projects without examining the long-term expansion program as a whole, frequently after the projects had already been built, the issue of how best to meet long term aviation growth was ignored.

To stop this piecemeal expansion of O'Hare, the State of Illinois and several of the plaintiffs in this case brought the *Illinois v. Butterfield* litigation, seeking disclosure of the City of Chicago's and the FAA's long-term aviation goals and a comprehensive exploration of alternatives to O'Hare expansion. The plaintiffs sought declaratory and injunctive relief under the National Environmental Policy Act, under the Administrative Procedure Act, and under various other federal statutes, to stop the expansion of O'Hare and the allegedly uncontrolled increase in aircraft operations, and noise and air pollution resulting therefrom. In addition to examining the alternatives to meet the long-term aviation operations demand for the Chicago metropolitan area, the plaintiffs wanted the FAA to select an alternative to meet the demand which did not involve the ever-increasing expansion of O'Hare.

*The Consent Decree*

The Consent Decree entered in the *Illinois v. Butterfield* litigation created a procedural framework for such comprehensive decision-making. According to Suburban O'Hare, in 1982 Chicago had proposed a massive construction program at O'Hare pursuant to an FAA sponsored "Master Plan." That Master Plan program involved the construction of hundreds of individual projects, and Chicago was ready to proceed with a number of these projects, designated as Phase I projects. Illinois and the plaintiff municipal entities in the *Illinois v. Butterfield* litigation were prepared to try to stop construction on Phase I projects by seeking injunctive relief. The Consent Decree thus resulted from an attempt to resolve competing interests: Phase I construction could proceed in return for the promise of the FAA and Chicago that all other construction proposed by the Master Plan, now called "Phase II" construction, would not commence until the FAA made a substantive decision to approve or disapprove the entire Master Plan proposal for [**1016**] meeting the 20-year metropolitan aircraft operations demand.

The Consent Decree itself provides in relevant part: that "[a]ll future development at O'Hare will comply with all then applicable requirements of Federal and State of Illinois laws requiring environmental analysis and processing" (Consent Decree, ¶ 1a); that construction of certain projects would not proceed until an Environmental Impact Statement was completed (Consent Decree, ¶ 1d); and that "the entire Master Plan development for O'Hare . . . will be presented to the FAA for Airport Layout Plan approval and the related environmental review, as a single, comprehensive submission" (Consent Decree, ¶ 1f).

The Airport Layout Plan ("ALP") is the final product of the Master Plan process and is based on the various facilities developed in the Master Plan to meet the 20 year long-term

aircraft operations demand of the Chicago metropolitan area. A Final Environmental Impact Statement ("FEIS") based on the requirements of the National Environmental Policy Act, 42 U.S.C. § 4321, *et seq.* ("NEPA"), accompanied the ALP, which was submitted by Chicago to the FAA in April 9, 1984. On May 31, 1984, the FAA approved the FEIS. The FAA described the issue in its Record of Decision reflecting the approval of the ALP as follows:

> The issue is whether to approve the Airport Layout Plan submitted by the City of Chicago. Approval of it would allow the City to proceed with implementing the proposed development at the airport and to request Federal funds for eligible items of development. Not approving it would prevent the City from proceeding with the development in a timely manner.

(Complaint, Exhibit 4 at p. 2.) On November 14, 1984, the FAA approved the ALP as the final product of Chicago's Master Plan. In the Record of Decision, the FAA specifically disavowed approval of the ALP for federal funding purposes:

> Approval of the Airport Layout Plan does not represent approval as far as necessity for the development is concerned nor is it a commitment of Federal funds for any future development. It signifies a concurrence for planning purposes based on review of conformance with current standards for safety, utility, and efficiency.

(Complaint, Exhibit 4 at p. 2.)

*The Present Suit*

On December 4, 1984, Suburban O'Hare filed its complaint in this Court, together with a motion for a temporary restraining order and for a preliminary injunction, supported by

extensive affidavits.[3] The Complaint, although lengthy, is in two counts. In Count I, Suburban O'Hare asserts that the FAA and the City defendants, in approving the ALP in the November 14, 1984 decision, violated the "letter and the spirit" of the Consent Decree; NEPA; the Airport and Airway Improvement Act of 1982, 42 U.S.C. § 2201, *et seq.* ("AAIA"); Section 176(c) of the Clean Air Act; and plaintiffs' "constitutional right to full disclosure of all relevant data, calculations and methodology." (Complaint, ¶ 172.) Suburban O'Hare alleges that it has a claim for relief in Count I both to enforce the Consent Decree and under the Administrative Procedure Act, 5 U.S.C. §§ 702, 706. (Complaint, ¶¶ 173, 175.) Suburban O'Hare prays that this Court declare that the November 14, 1984 FAA decision approving the Master Plan is "null, void and of no force and effect . . ." and that this Court enjoin the defendants "from taking any steps in reliance" on that decision.[4]

[1] Both the City defendants and the FAA have moved to dismiss Suburban [**1017**] O'Hare's complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted pursuant to Rules 12(b)(1) and

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[3] At a hearing on December 4, 1984 before this Court, Suburban O'Hare conceded that its motion for a temporary restraining order was prematurely brought because construction of Phase II projects was not set to proceed immediately as Suburban O'Hare thought. Thus, this Court denied the motion for a temporary restraining order as moot. A decision on Suburban O'Hare's motion for a preliminary injunction has been held in abeyance pending resolution of the defendants' motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted.

[4] Count II of the complaint is brought on behalf of plaintiff Lawrence Bieneman, incorporates all of the allegations of Count I, alleges injury to Bieneman in his person and property, and requests a hearing in accordance with Section 554 of the APA, 5 U.S.C. § 554.

12(b)(6) of the Federal Rules of Civil Procedure.[5] Because this Court holds that it lacks subject matter jurisdiction over this action, it does not reach the issues posed by the defendants' motions to dismiss for failure to state a claim upon which relief may be granted.

Finally, on January 14, 1984, Suburban O'Hare filed a Petition for Review in the United States Court of Appeals for the Seventh Circuit, in accordance with 49 U.S.C. § 1486(a), which is presently pending. Therefore, the dismissal by this Court of Suburban O'Hare's complaint for lack of subject matter jurisdiction does not affect Suburban O'Hare's substantive right to judicial review of the FAA's November 14, 1984 decision: such review must be sought in the first instance in the Court of Appeals. This Court's holding thus allows the Seventh Circuit to examine the jurisdictional issue at the inception of this case, thereby avoiding the potential waste of time, effort, and expense to both the parties and the judiciary of litigating

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[5] In addition, Suburban O'Hare has moved to compel the FAA to file the administrative record of its November 14, 1984 decision in this Court. After full briefing on the issue, and after a pretrial conference on January 30, 1985 this Court ordered that the FAA file the record in this Court on February 14, 1985 because a district court unquestionably has subject matter jurisdiction to do that which is necessary until it decides the issue of its subject matter jurisdiction. *United States v. United Mine Workers of America*, 330 U.S. 258, 67 S.Ct. 677, 91 L.Ed. 884 (1947). Moreover, this Court was mindful of the fact that the FAA in any event was preparing the record for filing in the Seventh Circuit Court of Appeals because Suburban O'Hare had filed a protective Petition for Review in that Court on January 14, 1985, and 49 U.S.C. § 1486(d) requires the FAA to file the record in the Court of Appeals within 40 days thereafter. That date was subsequently extended to February 22, 1985 on the FAA's motion to extend the time for filing the record due to exigent circumstances.

the case to final judgment in the district court only to have that judgment reversed ultimately for lack of subject matter jurisdiction.

## DISCUSSION

I. *Exclusive Jurisdiction Vests In The Court of Appeals to Review FAA "Orders" Under Section 1486.*

In its complaint, Suburban O'Hare seeks to set aside the November 14, 1984 decision of the FAA that approved the Master Plan and the ALP for O'Hare submitted by the City defendants. In addition to approving the ALP, that decision also made several other determinations under various FAA regulations promulgated under various sections of the Federal Aviation Act in Title 49 of the United States Code. The decision itself reflects that the FAA conducted its review pursuant to Parts 77, 152, and 157 of the FAA regulations, found in 14 C.F.R., respectively relating to: (1) obstruction evaluations for flight operations; (2) the federal airport aid program; and (3) notice requirements for airport construction or alteration. (Record of Decision, Complaint, Exhibit 4 at p. 19.) The FAA also granted exemptions pursuant to Part 139 of 14 C.F.R.

In addition to authority under the Consent Decree, the FAA's review pursuant to Parts 77, 157, and 139 of 14 C.F.R. clearly was conducted pursuant to authority vested in the FAA under Chapter 20 of Title 49; the FAA's review pursuant to Part 152 of 14 C.F.R. was conducted pursuant to authority under Chapter 31 of Title 49. The primary issue in this case is whether jurisdiction to review the FAA's November 14, 1984 decision vests in the district court or in the Court of Appeals.[6]

[6] All parties agree that the FAA's November 14, 1984 Record of Decision was a final agency action ripe for judicial review.

Contrary to the suggestion of the FAA, this issue is not simple. Courts have encountered substantial difficulty in determining when a challenged administrative action falls within the scope of a statute directing exclusive review in the Court of [1018] Appeals. No less an authority than Professor Kenneth Culp Davis has stated that the law governing the jurisdiction for review of challenged agency action "is both inordinately complex and extremely confused." K. Davis, *Administrative Law Treatise* § 23.03-1, at 372 (Supp.1982). This complexity and confusion has spawned a number of law review articles. *See, e.g.*, Comment, *The Forum for Judicial Review of Administrative Action: Interpreting Special Review Statutes*, 63 B.U.L.Rev. 765 (1983); Currie and Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 Colum. L.Rev. 1 (1975); Note, *Jurisdiction to Review Federal Administrative Action: District Court or Court of Appeals*, 88 Harv. L.Rev. 980 (1975).

[2] Despite the abundance of case law and scholarly commentary on the issue generally, the law is well settled that exclusive jurisdiction vests in the Court of Appeals to review all final orders of the FAA made under Chapter 20 of Title 49. Title 49 U.S.C. § 1486(a) provides:

> (a) *Any order, affirmative or negative, issued by the Board or Administrator under this chapter,* except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 1461 of this title, *shall be subject to review by the court of appeals* of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

(Emphasis supplied.) Section 1486(d) states that the court "shall have exclusive jurisdiction to affirm, modify or set aside the order. . . ."

In *Gaunce v. de Vincentis*, 708 F.2d 1290 (7th Cir.1983), *cert. denied*, ____ U.S. ____, 104 S.Ct. 417, 78 L.Ed.2d 354 (1983), the Seventh Circuit dismissed *sua sponte* an appeal from a district court judgment granting the defendants' motion for summary judgment. An airman claimed that the FAA violated her rights to procedural due process in revoking her airman's certificate. The FAA revoked the airman's certificate under its authority pursuant to Chapter 20 of Title 49. The Seventh Circuit held that Section 1486 expressly provides that any challenge to an FAA decision made under Chapter 20 can be brought only in the Court of Appeals, and dismissed the case for lack of subject matter jurisdiction in the district court:

> And most importantly, in plain disregard of the express terms of section 1486 of the Act, which prescribes direct and exclusive review in the court of appeals, plaintiff instituted the present action in the district court. This action is in derogation of the well settled principle that collateral attacks upon administrative orders are not permissible. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 48-50, 58 S.Ct. 459, 462-463, 82 L.Ed. 638 (1938); *Robinson v. Dow*, 552 F.2d 855, 858 (6th Cir.1975); *Oling v. Air Line Pilots Ass'n.*, 346 F.2d [270] at 276-277 [(7th Cir.1965)]; *see Administrative Procedure Act* § 10(b), 5 U.S.C. § 703 (1976) ("The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action . . . in a court of competent jurisdiction."); *see also Denberg v. United States Railroad Retirement Board*, 696 F.2d 1193 (7th Cir. 1983). It is clear from the statutory scheme established by Congress that the F.A.A. order was not subject to collateral attack in the district court. *Robinson v. Dow, supra; Oling v. Air Line Pilots Ass'n., supra.* Thus the district court lacked subject matter jurisdiction over the claims asserted by plaintiff-appellant.

708 F.2d at 1291-93 (footnote omitted). In dismissing the case for lack of subject matter jurisdiction in the district court, the Seventh Circuit adhered to a long line of [1019] decisions in this Circuit and others recognizing the congressional mandate in

Section 1486 of exclusive jurisdiction to review Chapter 20 FAA orders in the Courts of Appeal.[7]

Thus, if the November 14, 1984 decision of the FAA was made solely under Chapter 20 of Title 49, subject matter jurisdiction to review that decision clearly vests only in the Court of Appeals under Section 1486. Suburban O'Hare sets forth three principal arguments to support its contention that the November 14, 1984 decision must be reviewed in the district court. First, Suburban O'Hare contends that the decision was made not under Chapter 20 of Title 49, but under Chapter 31 of Title 49, the federal airport aid statute. Accordingly, Section 1486, which applies only to FAA orders made

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[7] *See, e.g., City of Aurora v. Hunt,* 749 F.2d 1457, 21 ERC 2132 (10th Cir.1984) (Tenth Circuit exercised its jurisdiction to review an FAA rule issued under Chapter 20 and under 14 C.F.R. Part 77); *City of Alexandria v. Helms,* 728 F.2d 643 (4th Cir.1984) (Fourth Circuit reversed for lack of subject matter jurisdiction the district court's issuance of a preliminary injunction to prevent implementation of a Chapter 20 FAA order regarding flight patterns of Washington National Airport); *State of New York v. Federal Aviation Administration,* 712 F.2d 806, (2d Cir.1983) (Second Circuit affirmed the district court's dismissal, for lack of subject matter jurisdiction, of a challenge to the FAA's refusal to amend an airport operating certificate it had previously issued under 49 U.S.C. § 1428 (part of Chapter 20)); *Sima Products Corp. v. McLucas,* 612 F.2d 309 (7th Cir.1980); *cert. denied,* 446 U.S. 908, 100 S.Ct. 1834, 64 L.Ed.2d 260 (1980) (Seventh Circuit held that a challenge to regulations promulgated under 49 U.S.C. § 1356 (part of Chapter 20) governing inspections of passengers was reviewable exclusively in the Court of Appeals); *City of Rochester v. Bond,* 603 F.2d 927 (D.C.Cir. 1979) (D.C.Circuit held that a "no hazard" determination of the FAA pursuant to 49 U.S.C. § 1501 (part of Chapter 20) was an order reviewable exclusively in the Court of Appeals, following other courts "*consistently holding that judicial review under these statutes is exclusive.*" *Id.* at 934); *Oling v. Air Lines Pilots Association,* 346 F.2d 270 (7th Cir.1965) (Seventh Circuit reversed a challenge to an FAA action based on Section 408 (part of Chapter 20)).

under Chapter 20, does not vest exclusive jurisdiction to review the decision in the Court of Appeals. Closely tied to this argument is Suburban O'Hare's assertion that the district court clearly has subject matter jurisdiction to hear Suburban O'Hare's claim that the defendants violated the Consent Decree in the *Illinois v. Butterfield* litigation. Finally, Suburban O'Hare contends that even if the November 14, 1984 decision was made pursuant to Chapter 20 of Title 49, the decision does not constitute an "order" reviewable exclusively in the Court of Appeals under Section 1486 because the FAA administrative record is either nonexistent or is based upon disputed issues of fact which must be examined and reviewed in the first instance in the district court pursuant to the general jurisdictional grant of 28 U.S.C. § 1331 and Sections 702 and 706 of the Administrative Procedure Act. Each of these arguments is examined below.

II. *The November 14, 1984 FAA Decision Consisted of FAA Orders Rendered Under Both Chapters 20 and 31 of Title 49.*

[3] Suburban O'Hare contends that the November 14, 1984 decision of the FAA was not an "order" made under Chapter 20 and thus is not exclusively reviewable in the Court of Appeals under Section 1486 which provides for such exclusive review only for orders made under "this chapter." 49 U.S.C. § 1486(a). Instead, Suburban O'Hare asserts that the "order" challenged here is the FAA's substantive and procedural compliance with the Airport and Airway Improvement Act of 1982, 49 U.S.C. § 2201, *et seq.*,[8] and as such was made under Chapter 31 of Title 49.

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[8] The Airport and Airway Improvement Act of 1982 ("AAIA"), 49 U.S.C. § 2201, *et seq.*, is the current federal airport aid statute appearing in Chapter 31 of Title 49. Its immediate precessor was the Airport and Airway Development Act of 1970 (P.L. 91-248), which in turn was immediately preceded by the Federal Airport Act of 1946 (P.L. 377). Each of these statutes has always been codified separately from Chapter 20 of Title 49.

Suburban O'Hare attached the November 14, 1984 letter approving the ALP and the 20 page Record of Decision of the FAA as Exhibits 3 and 4, respectively, to its complaint. As such, they are part of the [1020] complaint pursuant to Rule 10 of the Federal Rules of Civil Procedure. Suburban O'Hare contends that by this approval, reflected in Exhibits 3 and 4, the FAA violated the letter and spirit of the Consent Decree and several federal laws, including the AAIA, NEPA, the Clean Air Act, and the APA. The November 14, 1984 decision reflects that the FAA relied upon 14 C.F.R. Part 77 (promulgated under Chapter 20), Part 157 (promulgated under Chapter 20), and Part 152 (promulgated under Chapter 31). In addition, the FAA granted the City an exemption from the 14 C.F.R. Part 139 regulations (promulgated under Chapter 20). Thus, of the four "orders" entered by the FAA, three were under Chapter 20.[9]

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[9] Part 157 states that it is promulated under 49 U.S.C. §§ 1350, 1354(a), and 1355, *See* 14 C.F.R. Part 157 at p. 156 (1984). Part 77 states that it is promulgated under 49 U.S.C. §§ 1304, 1348, 1354, 1431, and 1501. The FAA's authority for the grant to the City of an exemption from the clearance standards of airport taxiways under Part 139 of 14 C.F.R. arises from 49 U.S.C. §§ 1432 and 1421(c). All of these statutory references are part of Chapter 20. for example, Section 1350 states:

> § 1350. Establishment or construction of airports and landing areas not involving expenditure of Federal funds. In order to assure conformity to plans and policies for, and allocations of, airspace by the Administrator under section 1348 of this title, no airport or landing area not involving expenditure of Federal funds shall be established, or constructed, or any runway layout substantially altered unless reasonable prior notice thereof is given the Administrator, pursuant to regulations prescribed by him, so that he may advise as to the effects of such construction on the use of airspace by aircraft.

By contrast, Part 152 of 14 C.F.R. was promulgated under the Airport and Airways Development Act of 1970, as amended, 49 U.S.C. § 1701, *et seq.*, which subsequently became part of Chapter 31 of Title 49.

Suburban O'Hare does not contest the fact that the November 14, 1984 FAA decision constituted at least in part an "order" entered under Chapter 20. In its memorandum in opposition to the defendants' motion to dismiss, Suburban O'Hare stated: "Of the 'orders' entered by the FAA on November 14, 1984, two of those orders were under Chapter 20." (P. 4.) Suburban O'Hare contends that "[t]hese orders are not challenged in this action." (Pp. 4-5.) Suburban O'Hare further contends that because the November 14, 1984 FAA decision was also based on the AAIA, Chapter 31 of Title 49, the exclusive jurisdiction of the Court of Appeals to review the entire order under Section 1486 is usurped by the inclusion of this additional element. Indeed, Suburban O'Hare's allegation that the defendants have violated the Consent Decree is intimately related to its argument that the November 14, 1984 FAA decision should have been made properly under Chapter 31. That argument was succinctly summarized by Suburban O'Hare in its memorandum in opposition to the defendants' motion to dismiss, at pp. 16-17:

> In this lawsuit, Plaintiffs also seek to enforce the 1982 Consent Decree which sets the legal framework for the substantive decision made by the FAA. As set forth in the Complaint and as admitted by Defendants, the Consent Decree remedied the past piecemeal practices followed by Chicago and the FAA in giving isolated grants, and required the FAA to make the substantive decisions normally made at the time grant applications were received now—at the time the entire Master Plan was submitted—rather than wait until individual isolated grant applications are received.
>
> Chicago and the FAA admit these allegations for the purposes of these motions, and the FAA itself stated that it was making these decisions *now* in its November 14, 1984 approval. However, in their memoranda, Defendants make unsupported assertions that the requirements of the Airport and Airway Improvement Act of 1982 do not apply because no grant application has been made. That argument is exactly what the Consent Decree framework

> was intended to prevent by requiring the substantive decision to be made now rather than after the project was almost complete.

(Footnote omitted.)

Suburban O'Hare's argument does have some merit in that there is support in the [1021] Consent Decree, in the Final Environmental Impact Statement, and in the November 14, 1984 FAA decision itself for Suburban O'Hare's position that the parties to the Consent Decree contemplated that that decision would be rendered under the AAIA, Chapter 31. The defendants' contention that the AAIA is not applicable because it is uncontested that no federal funding has yet been sought for the Phase II construction is unpersuasive because it is equally uncontested that federal funds, in the amount of at least $43 million, will be sought ultimately to help fund the Phase II construction. The defendants can not avoid their obligations under the AAIA simply because they have not yet applied for such funding, particularly in light of Suburban O'Hare's allegations, which must be taken as true for purposes of these motions to dismiss, that such piecemeal after-the-fact funding of construction projects resulting in the expansion of O'Hare was precisely what the Consent Decree was designed to prevent. Moreover, after briefing was completed on these motions, the Court was informed that the City did indeed apply for a $1.2 million federal grant for Phase II construction as early as November 30, 1984, and the plaintiffs have been granted leave to amend their complaint to so allege.

Nonetheless, Suburban O'Hare has not demonstrated that the FAA's approval under Chapter 20 pursuant to Parts 77, 139, and 157 was either unnecessary or insubstantial. Neither has Suburban O'Hare alleged that those parts of the FAA's November 14, 1984 decision that are based on Chapter 20 are separable from those parts based on Chapter 31. Nor has Suburban O'Hare alleged that the FAA's Chapter 20 orders are a mere ruse to avoid review of the defendants' conduct

pursuant to the Consent Decree and under the APA in this Court.

In light of the overwhelming weight of authority that mandates exclusive review in the Court of Appeals whenever a FAA decision based on Chapter 20 is challenged, *see* discussion below, this Court believes that it cannot exercise its general federal question jurisdiction to review the FAA November 14, 1984 decision which at least in part, as Suburban O'Hare concedes, consists of orders rendered pursuant to the FAA's statutory authority under Chapter 20 of Title 49. Thus, even if the defendants did in fact violate the Consent Decree as Suburban O'Hare contends by failing to "make the substantive decisions [required by the AAIA] *now* in its November 14, 1984 approval," it is undisputed that the November 14, 1984 FAA decision was made, at least in part, under Chapter 20 of Title 49. As such, it is reviewable only by the Court of Appeals under Section 1486.

The November 14, 1984 FAA decision is a unitary order approving, under various statutory requirements, the form that O'Hare will take when Phase II construction is completed. Suburban O'Hare challenges the FAA's procedural and substantive compliance with various federal laws in reaching that decision to approve the Master Plan and the ALP for O'Hare. Moreover, Suburban O'Hare seeks not to set aside an isolated component of the decision, but that this Court declare that "the November 14, 1984 FAA decision approving the City of Chicago's Master Plan project is null, void and of no force and effect . . ." and that an injunction be entered restraining defendants "from taking any steps in reliance on the November 14, 1984 FAA decision. . . ." Accordingly, Suburban's O'Hare's complaint is an attack on a single unitary order entered by the FAA. In conceding that the November 14, 1984 FAA decision is based in part on Chapter 20, Suburban O'Hare has in effect conceded that the entire decision must be reviewed only in the Court of Appeals.

Even if the November 14, 1984 FAA decision should have been made only pursuant to Chapter 31 of Title 49, the AAIA, the cases cited by Suburban O'Hare do not support its contention that the district court has general federal question jurisdiction under 28 U.S.C. § 1331 and the APA to review an order under Chapter 31. Suburban O'Hare contends that the jurisdictional issue before this Court is directly con-[**1022**]trolled by the decisions in *Schwab v. Quesada*, 284 F.2d 140 (3d Cir.1960), and *City of Dallas v. Rentzel*, 172 F.2d 122 (5th Cir.1949), *cert. denied*, 338 U.S. 858, 70 S.Ct. 99, 94 L.Ed. 525 (1949), both involving the Federal Airport Act, a predecessor to the AAIA. Suburban O'Hare asserts that in these cases the FAA itself successfully argued to the Circuit Courts of Appeal that because decisions made under the Federal Airport Act were made under a Chapter in Title 49 different from Chapter 20, the exclusive jurisdiction provision of Section 1486 did not apply, thus rendering those decisions unreviewable in the Courts of Appeal. But none of the cases cited by Suburban O'Hare address the jurisdiction of the district court to review decisions under the Federal Airport Act. Indeed, in *Schwab*, the Third Circuit found no jurisdiction to review the decision under the Federal Airport Act because it held that the decision was unreviewable in any court. 284 F.2d at 142. In *City of Dallas*, the Fifth Circuit acknowledged the FAA's argument that the order under the Federal Airport Act was unreviewable in any court, but found it unnecessary to reach the issue. 172 F.2d at 123 and nn. 7, 8. *Cf. Morris v. Helms*, 681 F.2d 1162, 1164 (9th Cir.1982). Whatever the continuing validity of the *Schwab* and *City of Dallas* cases, particularly in light of the new AAIA which is at issue here, they do not stand for the proposition that if the Court of Appeals lacks jurisdiction to review an FAA order, the district court necessarily has such jurisdiction: the order may simply be unreviewable.

Because this Court holds that the FAA November 14, 1984 decision is reviewable in the Court of Appeals under Section

1486, this Court need not, and, therefore, does not decide whether a Chapter 31 FAA order pursuant to the AAIA is unreviewable in any court. To the contrary, district courts have assumed general federal question jurisdiction to decide cases brought under the AAIA as well as other federal statutes, although these courts have not directly addressed the jurisdictional issue because they were not directly confronted with it and because they unquestionably had jurisdiction over claims based on other federal statutes. *See, e.g., Life of the Land v. Brinegar,* 485 F.2d 460 (9th Cir. 1973), *cert. denied,* 416 U.S. 961, 94 S.Ct. 1979, 40 L.Ed.2d 312 (1974); *Citizens Airport Committee of Chesterfield County v. Volpe,* 351 F.Supp. 52 (E.D.Va.1972).

It is worth noting, however, that Chapter 31 contains no judicial review provision itself. Moreover, the Supreme Court has recently held that neither the general federal question jurisdiction under 28 U.S.C. § 1331 nor the APA provide an independent basis for establishing jurisdiction in the district court to review an agency's decision when a statute directs an exclusive form of judicial review:

> With respect to our holding that there is no jurisdiction pursuant to § 1331, the dissent argues that § 405(h) [prescribing a different form of review for Medicare claims] is not a bar to § 1331 jurisdiction because Ringer's challenge to the Secretary's rule is "arising under" the Administrative Procedure Act, not the Medicare Act. *Post,* at 647 [104 S.Ct. at 2025], But the dissent merely resurrects an old argument that has already been raised and rejected before by this Court in *Weinberger v. Salfi* [422 U.S. 749, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975)], *supra.* As we have already noted earlier, *ante,* at 636 [104 S.Ct. at 2022], the Court rejected the argument that the claimant in *Salfi* could bring his constitutional challenge to a Social Security Act. Ringer's claim may well "aris[e] under" the APA in the same sense that Salfi's claim arose under the Constitution, but we held in *Salfi* that the constitutional claim was nonetheless barred by § 405(h). It would be anomalous indeed for this Court to breathe life into the

> dissent's already discredited statutory argument in order to give greater solicitude to an APA claim than the Court thought the statute allowed it to give to the *constitutional* claim in *Salfi*.

*Heckler v. Ringer*, ____ U.S. ____, 104 S.Ct. 2013, 2025-26, 80 L.Ed.2d 622 (1984); *see* [1023] *also Califano v. Sanders*, 430 U.S. 99, 104-09, 97 S.Ct. 980, 983-86, 51 L.Ed.2d 192 (1977) (Supreme Court held that Section 702 of the APA must be used together with 28 U.S.C. § 1331 and with another substantive statute to confer subject matter jurisdiction on the district court; Section 702 and 28 U.S.C. § 1331 alone do not confer jurisdiction).

The holding of this Court that the November 14, 1984 decision of the FAA is reviewable only in the Court of Appeals because it is a mixed decision made under the FAA's authority based on both Chapter 20 and Chapter 31 of Title 49 is consistent with the law of this and other Circuits. In cases involving the review of FAA orders which also contained claims made under other statutes or the Constitution, and in cases involving parallel statutes with provisions similar to Section 1486 vesting exclusive jurisdiction in the Court of Appeals for judicial review of final agency orders, this Circuit and others have uniformly held that judicial review rests exclusively in the Court of Appeals. For example, as noted above in *Gaunce v. deVincentis*, 708 F.2d 1290 (7th Cir. 1983) *cert. denied*, ____ U.S. ____, 104 S.Ct. 417, 78 L.Ed.2d 354 (1983), the Court of Appeals *sua sponte* dismissed for lack of jurisdiction on appeal from a district court judgment upholding the procedural due process afforded an airman by the FAA in a hearing relating to the revocation of an airman's certificate. As here, the plaintiff in *Gaunce* raised constitutional claims, but the Seventh Circuit held that even the assertion of a claim under the Constitution, jurisdiction over which indisputably vests in the district court under 28 U.S.C. § 1331, cannot divest the Court of Appeals' exclusive jurisdiction to decide the entire order:

> The statutorily prescribed requirements cannot be dispensed with merely because the administrative proceedings dealt with an agency's proof of specified regulatory violations, while appellant is raising a due process constitutional claim in the judicial proceeding. So long as effective means for judicial review are ultimately available where the constitutional claims can be raised, appellant may not dispense with the requirement of prior administrative review, otherwise judicial review would be an abstract process.

*Id.* at 1293.

In *City of Alexandria v. Helms*, 728 F.2d 643 (4th Cir.1984), the Fourth Circuit reversed a preliminary injunction issued by the district court to prevent implementation of an FAA order relating to a "scatter plan" for flight patterns at Washington's National Airport instituted by the FAA to more equitably distribute aircraft noise among area surrounding the airport. The court held that the district court lacked subject matter jurisdiction because Section 1486 "vests review of FAA orders exclusively in the Courts of Appeals." *Id.* at 645. The Court of Appeals flatly rejected the plaintiffs' contention that their claims under NEPA provided an independent basis for jurisdiction in the district court:

> Alexandria and Arlington additionally contend that the National Environmental Policy Act (NEPA) provides an independent basis for district court jurisdiction in this case. *Cf. City of Irving v. Federal Aviation Administration*, 539 F.Supp. 17, 34 (N.D.Tex.1981) (FAA's decision not to issue an EIS was subject to review in the district court when there was no order to review and only claim was under NEPA). However, when review of an agency order is at issue and when Congress has vested exclusive jurisdiction over that review in the Courts of Appeals, NEPA does not provide independent grounds for district court jurisdiction.

*Id.* at 646 (footnote omitted).

Similarly, in *City of Rochester v. Bond*, 603 F.2d 927 (D.C.Cir.1979), the District of Columbia Circuit Court of Appeals rejected the argument that plaintiff's NEPA claim provided a basis for concurrent district court jurisdiction for review of an FAA advisory determination that construction of a radio antenna near an airport would be "no hazard," a determination which the court deemed to constitute a final order [**1024**] exclusively reviewable only in the Court of Appeals:

> First, we disagree that the district court may exercise concurrent jurisdiction merely because a violation of NEPA is alleged. The allegation may be raised directly in the courts of appeals; and insofar as it may affect the lawfulness of a directly appealable order we think it must be.

*Id.* at 936 (footnotes omitted).[10]

The Seventh Circuit has also held that the inclusion of a NEPA claim provides no basis for concurrent jurisdiction permitting district court review of an agency's decision. In *City of West Chicago, Illinois v. United States Nuclear Regulatory Comm'n.*, 701 F.2d 632 (7th Cir.1983), the court affirmed the district court's dismissal, for lack of subject matter jurisdiction, of a suit challenging the Nuclear Regulatory Commission's

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[10] In a footnote, *Bond* distinguished *State of Illinois ex rel. Scott v. Butterfield*, 396 F.Supp. 632 (N.D.Ill.1975), because there was no final agency action by the FAA in the *Illinois v. Butterfield* litigation at that time. 603 F.2d at 936, n. 51. Clearly the district court had subject matter jurisdiction in the *Illinois v. Butterfield* litigation under 28 U.S.C. § 1331 when it entered the Consent Degree in 1982. Suburban O'Hare's argument that the decision of the district court set forth in *State of Illinois ex rel. Scott v. Butterfield*, 396 F.Supp. 632 (N.D.Ill. 1975) that it possessed subject matter jurisdiction is *res judicata* here is disingeneous in light of the fact that no final FAA orders, Chapter 20 or otherwise, which the district court was asked to review, had issued at that time.

order allowing the demolition of certain buildings under the parallel judicial review provision, 28 U.S.C. § 2342(4), concerning review of the Commission's Order. The Seventh Circuit concluded that the district court lacked jurisdiction to determine if the agency's order complied with NEPA:

> Despite the admission in its brief, the City continues to argue that the district court had jurisdiction to review the claim of illegal segmentation under NEPA. *Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor,* 619 F.2d 231 (3d Cir.1980), certiorari denied *sub nom. General Pub. Utilities Corp. v. Susquehanna Valley Alliance,* 449 U.S. 1096, 101 S.Ct. 893, 66 L.Ed.2d 824. See *supra* at 650-652. Suffice it to say that as in this case, where final agency action brings an order within the ambit of 28 U.S.C. § 2342(4), the district court has no concurrent jurisdiction with the court of appeals to review the order for NEPA compliance. *City of Rochester v. Bond,* 603 F.2d 927, 936 (D.C.Cir.1979).

*Id.* at 652 n. 21.[11] *See also Sierra Club. v. United States Dept. of Transportation,* 753 F.2d 120, No. 83-1832 (D.C.Cir.1985) (Court of Appeals exercised jurisdiction under Section 1486 to decide a challenge to two FAA orders entered under Chapter 20 even though the petitioners claimed that, in addition to NEPA, a section in another chapter of Title 49, 49 U.S.C.

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[11] The district court's decision in *City of West Chicago,* which was affirmed, also held that the inclusion of a due process claim did not alter the Court of Appeals' exclusive jurisdiction:

> Involved here is an express jurisdictional mandate to the court of appeals which this court must respect. Although the plaintiff is raising a constitutional claim, it is directed to, and arises from the NRC's grant of a license amendment under the AEA. Therefore, this constitutional challenge pertains to the final order issued by the NRC and must be reviewed by the court of appeals.

*City of West Chicago, Illinois v. United States Nuclear Regulatory Comm'n,* 542 F.Supp. 13, 15 (N.D.Ill.1982). (Citations omitted.)

§ 303(c), had been violated by the order); *City of Aurora v. Hunt*, 749 F.2d 1457, 21 ERC 2132 (10 Cir.1984) (Tenth Circuit reviewed an FAA rule issued under Chapter 20 and also decided a challenge under NEPA pursuant to its exclusive jurisdiction under Section 1486). Thus, Suburban O'Hare's claims under Chapter 31 of Title 49, as well as its claims under NEPA, and the Clean Air Act, and the due process constitutional claim, cannot defeat Section 1486 exclusive jurisdiction in the Court of Appeals of an FAA decision rendered in part under Chapter 20.

The Seventh Circuit has stated repeatedly that even where doubt exists as to whether jurisdiction properly lies in the Court of Appeals or the district court to review an agency decision which arguably [**1025**] may fall within the ambit of an exclusive Court of Appeals' jurisdictional provision, all doubt must be resolved in favor of direct review by the Court of Appeals. *E.g., Indiana & Michigan Electric Co. v. United States Environmental Protection Agency*, 733 F.2d 489, 491 (7th Cir.1984) (A "judge" made presumption [exists] in favor of court of appeals review in doubtful cases . . . [because] district court review adds another layer to the review process . . . .); *Field Container Corp. v. Interstate Commerce Comm'n.*, 712 F.2d 250, 255 (7th Cir.1983), *cert. denied*, ____ U.S. ____, 104 S.Ct. 701, 79 L.Ed.2d 167 (1984) (". . . the policy of routing review proceedings to the courts of appeals directly where the statute will allow this entitles us to resolve our doubts in favor of [court of appeals] jurisdiction . . ."); *Denberg v. United States Railroad Retirement Board*, 696 F.2d 1193, 1197 (7th Cir.1983), *cert. denied*, ____ U.S. ____, 104 S.Ct. 1706, 80 L.Ed.2d 180 (1984) (Any jurisdictional ambiguity is resolved in favor of Court of Appeals jurisdiction.). Indeed, even Suburban O'Hare's assertions that this Court must exercise its jurisdiction under §1331 and the APA to decide its claims that the defendants violated the Consent Decree cannot vitiate the

exclusive jurisdiction of the Court of Appeals in the first instance.[12]

III. *Suburban O'Hare's Allegations Of Consent Decree Violations Do Not Affect The Exclusive Jurisdiction Of the Court Of Appeals.*

Suburban O'Hare asserts that the Consent Decree entered into between the parties in the *Illinois v. Butterfield* litigation provided that the FAA was to approve or disapprove Chicago's 20 year long-term development program to meet Chicago's future aviation needs through the "Master Plan" decision-making process. To accomplish this, the FAA was to compare Chicago's Master Plan proposal with all other alternatives to meet Chicago's long-term aviation needs, and toward this end the FAA was to prepare or complete a Final Environmental Impact Statement pursuant to the requirements of NEPA. According to Suburban O'Hare, the Consent Decree provided a procedural framework in which both FAA substantive and procedural decisions, normally not undertaken until the receipt of a federal grant application, would be made at the time the Master Plan was submitted and before any Phase II construction was to begin.

By entering into the Consent Decree, the plaintiffs in the *Illinois v. Butterfield* litigation purportedly received the promise of the FAA and the City defendants that construction of Phase II would not begin until the defendants followed the procedural

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[12] *See Assure Competitive Transportation, Inc. v. United States*, 629 F.2d 467, 472 (7th Cir. 1980), *cert. denied*, 449 U.S. 1124, 101 S.Ct. 941, 67 L.Ed.2d 110 (1981) (court held that exclusive jurisdiction lies in the court of appeals to review an I.C.C. order even though the order itself was not directly attacked because "the practical effect of a successful suit would contradict or countermand a Commission order," *quoting B.F. Goodrich Co. v. Northwest Industries, Inc.*, 424 F.2d 1349, 1353-54 (3d Cir. 1970), *cert. denied*, 400 U.S. 822, 91 S.Ct. 41, 27 L.Ed.2d 50 (1970)).

prerequisites set forth in the Decree leading to a decision to approve or disapprove the Master Plan. In turn, the defendants allegedly were allowed to proceed with Phase I construction without preparing an Environmental Impact Statement and without ongoing litigation over Phase I construction.

As an initial matter, it must be noted that if Suburban O'Hare was indeed interested in enforcing the terms of the Consent Decree, as it contends, it should have filed a motion for such enforcement and the imposition of civil contempt and other relief in the *Illinois v. Butterfield* litigation, Case No. 74 C 2410. Instead, Suburban O'Hare filed a new complaint which was randomly assigned to this Court. Suburban O'Hare states that in filing a new complaint it merely followed the directions of the Office of the Clerk of this District. Suburban O'Hare allegedly was informed by that Office that the *Illinois v. Butterfield* case was closed for administrative purposes when the Consent Decree was entered in October, 1982. Moreover, Judge [1026] Roszkowski, who entered the Consent Decree, has since transferred to the Western Division of the United States District Court for the Northern District of Illinois. According to Suburban O'Hare:

> The office of the Clerk of the Court has advised us that when a matter is presented to the assignment desk that relates to a *closed* case that had been assigned to Judge Roszkowski, the assignment desk would assign the matter to a new judge by lot. That procedure was followed in this case.

Plaintiff's Memorandum On Consent Decree Issues at p. 10 n. 5.

Unfortunately, however, Suburban O'Hare neglects to mention that the Office of the Clerk never informed it to file a *new* complaint in the district court. This Court has been informed by Stuart Cunningham, the Clerk, that Suburban O'Hare properly should have filed a motion for enforcement of the Consent Decree in the *Illinois v. Butterfield* litigation, Case

No. 74 C 2410, at which point it would have been reassigned at random *by order of the Executive Committee* from Judge Roszkowski's docket if Judge Roszkowski did not wish to retain the case.

In this instance, although the result may have been the same because the matter ultimately was assigned to this Court at random by lot, insistence on the proper procedure is not trivial. First, Judge Roszkowski, the judge who entered the Consent Decree and who was familiar with the progress of the *Illinois v. Butterfield* litigation to that point, should have been given the opportunity to retain it. Judicial economy dictates such a result as this Court was forced to search through three containers of court files from the federal warehouse of this district to familiarize itself with the case.[13] Second, this Court hesitates to establish a precedent of allowing the procedure adopted by Suburban O'Hare to be followed in the future. Because this Court and others in this District are burdened with literally hundreds of cases, it is both wasteful and counter-productive to file a new complaint whenever enforcement of a previously-entered consent decree in another case is sought.[14]

[**4-6**] Nonetheless, Suburban O'Hare quite properly argues that there is no question that subject matter jurisdiction

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[13] Many of the court documents in the *Illinois v. Butterfield* litigation were missing from these containers. Indeed, because the Consent Decree itself was missing, and because Suburban O'Hare omitted to attach it to the complaint and then belatedly submitted a version of the Consent Decree different from that submitted by the defendants, much needless time and energy were devoted in searching for it.

[14] The cases cited by Suburban O'Hare as precedent for the procedure it followed here of filing a new complaint simply do not support such a procedure. For example, in *Sarabia v. Toledo Police Patrolman's Association,* 601 F.2d 914 (6th Cir.1979), nothing in the court's opinion indicates that the enforcement order appealed from was entered in any case but the original case in which the consent decree was entered.

exists generally in the district court to enforce its own consent decree. In the Consent Decree entered in the *Illinois v. Butterfield* litigation, the district court expressly retained jurisdiction to enforce the decree, but even had it not done so, it is well-settled that a district court has ancillary jurisdiction to enforce its own consent decree. *Sarabia v. Toledo Police Patrolman's Ass'n.*, 601 F.2d 914 (6th Cir.1979); *see generally*, Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction 2d.* § 3513. Although the normal remedy for a consent decree violation is the imposition of civil contempt, *see, e.g., United States v. Board of Education of the City of Chicago*, 744 F.2d 1300, 1308 (7th Cir. 1984); *Shakman v. Democratic Organization of Cook County*, 533 F.2d 344 (7th Cir.1976), *cert. denied*, 429 U.S. 858, 97 S.Ct. 156, 50 L.Ed.2d 135 (1976), the court may award any appropriate relief in addition to enforcing the decree. *See, e.g., Shakman, supra* at 351 (awarding attorneys' fees and expenses as well as compensatory damages); *Vuitton et Fils S.A. v. Carousel Handbags*, 592 F.2d 126, 130 (2d Cir.1979) ("The district court is not free to exercise its discretion and withhold an or-[1027]der in civil contempt awarding damages, to the extent they are established.").

Despite the existence of jurisdiction generally to enforce its own judgments, the question posed in this case is whether the district court *must exercise* its jurisdiction to enforce a Consent Decree that in essence requires it to review an agency decision which Congress has mandated by statute is reviewable only in the Court of Appeals. This question is a matter of first impression so far as this Court is able to determine.[15] For the

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[15] From the inception of this case, this Court has repeatedly asked the parties to brief, by citing relevant authority, the issue of whether Suburban O'Hare's claim of Consent Decree violations affects the exclusive jurisdiction of the Court of Appeals to review the FAA November 14, 1984 decision. Neither the FAA nor the City defendants have cited any cases,

*(Footnote continued on following page)*

reasons set forth below, this Court holds that it cannot exercise subject matter jurisdiction to enforce the Consent Decree under the circumstances presented by this case.

[7] First, the cases discussed in Sections I and II of this Opinion unequivocably hold that the assertion of any claim for relief over which the district court has general federal question jurisdiction does not divest the exclusive jurisdiction of the Court of Appeals to review an FAA decision based in part on Chapter 20 under Section 1486. For example, in *Gaunce v. deVincentis*, 708 F.2d 1290, 1293 (7th Cir. 1983), *cert. denied*,

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*(Footnote continued from preceding page)*

and none of the cases cited by Suburban O'Hare are on point. For example, in *Motorola, Inc. v. Computer Displays International*, 739 F.2d 1149 (7th Cir.1984), the Seventh Circuit ruled that it did not possess jurisdiction to review a district court's finding of civil contempt for violation of a consent decree in the absence of a district court order that included the imposition of an appropriate sanction as well as the finding of contempt. *Motorola* does not stand for the proposition that a Court of Appeals never has original jurisdiction to enforce a consent decree when the exercise of that jurisdiction is necessary to effectuate its exclusive jurisdiction to review a Chapter 20 order. To the contrary, another case cited by Suburban O'Hare, *Brennan v. Winters Battery Manufacturing Co.*, 531 F.2d 317 (6th Cir.), *cert. denied, sub. nom., Winters Battery Manufacturing Co. v. Usery*, 425 U.S. 991, 96 S.Ct. 2202, 48 L.Ed.2d 815 *reh. denied*, 429 U.S. 873, 97 S.Ct. 192, 50 L.Ed.2d 155 (1976), suggests that a Court of Appeals does indeed possess original jurisdiction to enforce consent decrees: "Enforcement by judicial decree provides a basis for contempt proceedings in this court in event of noncompliance." *Id.* at 321 (citation omitted). Similarly, the case of *District of Columbia v. Train*, 533 F.2d 1250 (D.C.Cir.1976), also cited by Suburban O'Hare, does not support its argument that Courts of Appeal may never hear cases involving consent decrees. To the contrary, the court's opinion suggests that the Court of Appeals could properly decide the consent decree issues if the decree was within the scope of exclusive statutory grant of jurisdiction. *Id.* at 1254. *See also* n. 17 and accompanying text, *infra*.

____ U.S. ____, 104 S.Ct. 417, 78 L.Ed.2d 354 (1983), the plaintiff's assertion of a due process constitutional claim, over which a district court unquestionably possesses general federal question jurisdiction, had no affect on the Seventh Circuit's holding that jurisdiction vests exclusively in the Court of Appeals to review a Chapter 20 order.[16]

Similarly, Suburban O'Hare's assertion of the defendants' Consent Decree violations cannot deprive the Court of Appeals of its exclusive jurisdiction conferred by statute to review the FAA decision at issue in this case in the first instance. The Court of Appeals may exercise jurisdiction over the enforcement of the Consent Decree as well as its exclusive jurisdiction under Section 1486 because it may exercise jurisdiction over any proceedings which are incidental or ancillary to an original action where original jurisdiction over the action lies in the Court of Appeals.[17] Because the Court of Appeals is capable of deciding all of the issues raised by Suburban O'Hare in conducting its Chapter 20 review, the Con-[1028]sent Decree cannot affect subject matter jurisdiction over this case.

[8, 9] Second, parties cannot by their agreement alone confer subject matter jurisdiction over a case which would not otherwise exist. *Green v. Department of Commerce*, 618 F.2d 836, 839 (D.C.Cir.1980); *Sadat v. Mertes*, 615 F.2d 1176 (7th Cir. 1980). Thus, even though parties may, by entering into a consent decree, waive certain rights to which they otherwise

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[16] *See also* the district court's decision in *City of West Chicago, Illinois v. United States Nuclear Regulatory Comm'n.*, 542 F.Supp. 13, 15 (N.D.Ill. 1982), *affd*, 701 F.2d 632 (7th Cir.1983), quoted at n. 11, *supra*.

[17] As the Seventh Circuit stated in *Natural Gas Pipeline Co. v. Federal Power Comm'n.*, 128 F.2d 481, 484 (7th Cir.1942), "the court may by its own orders protect the rights of the parties in any manner in which any trial court of equity or general jurisdiction might do so in an injunction suit."

might be entitled,[18] they may not waive the right to exclusive review of a Chapter 20 order under Section 1486 in the Court of Appeals by entering into a consent decree and thereby confer such jurisdiction by agreement on the district court.

Third, the Consent Decree in the *Illinois v. Butterfield* litigation by its terms excludes from its scope a review of the actual FAA decision reached in approving or disapproving the Master Plan. The operative paragraph of the Decree, states: "The FAA has not made any determinations with respect to [the Master Plan approval] and this Decree does not bind the FAA with regard to any determinations it may make respecting these matters." (Consent Decree, ¶ 1g at p. 4.) In one sense, this language adds nothing because it merely states the obvious: the FAA was not bound by the Consent Decree itself to either approve or disapprove the Master Plan proposal after meeting the procedural and substantive requirements of the Decree and the various laws the parties were bound to follow. On the other hand, this language is consistent with the FAA's argument that it never intended to, and never did, enter into a Consent Decree which would render any decision it made on the Master Plan reviewable in the district court.

Finally, at a pretrial conference held in this Court on January 30, 1985, Suburban O'Hare in effect conceded that its claims under the Consent Decree afford Suburban O'Hare substantially the same relief as it seeks under its claims brought pursuant to the APA. (Transcript of Proceedings at pp. 71-72.) In fact, Count I of the complaint is grounded both in the APA and in the Consent Decree. If the Consent Decree adds nothing to the complaint, then the exclusive jurisdiction of the Court of

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[18] For example, in this case, it is not inconceivable, as the City defendants have conceded, that the defendants might have waived their right by entering into the Consent Decree not to be subject to a private right of action for violations of certain substantive laws such as the Clean Air Act. *See* Transcript of Proceedings of January 30, 1985 before this Court at pp. 55-57.

Appeals to review the November 14, FAA decision under Section 1486 cannot be altered by the Consent Decree.

This Court's holding that the existence of the Consent Decree and Suburban O'Hare's claims thereunder do not affect the exclusive jurisdiction of the Court of Appeals to review the November 14, 1984 FAA decision does not suggest that the Consent Decree was never enforceable in the district court. Contrary to the defendants' suggestion, the Consent Decree is not a useless document that provides no substantive rights to Suburban O'Hare. Subject matter jurisdiction to enforce the Decree and to address any claimed violations of the various laws that the defendants bound themselves to follow in the Decree unquestionably existed in the district court before November 14, 1984, the date the FAA rendered its decision. Once that decision issued, however, jurisdiction vested solely in the Court of Appeals to review it pursuant to Section 1486 because it was rendered under both Chapter 20 and Chapter 31 of Title 49.

IV. *The November 14, 1984 FAA Decision Is An "Order".*

[**10**] Suburban O'Hare argues that, should this Court decide that the November 14, 1984 decision of the FAA approving the Master Plan and the ALP for Phase II construction at O'Hare falls within the ambit of Section 1486 because it was at least in part made under Chapter 20, then it is not an "order" within the meaning of Chapter 20. Suburban O'Hare's contention is based on the following reasoning:

> [**1029**] 1) The scope of judicial review provided in Section 1486 is that the FAA's factual findings are subject to review under the "substantial evidence" test. 49 U.S.C. § 1486(e).
>
> 2) The "substantial evidence" test necessarily contemplates that an agency adjudicatory hearing "on the record" was conducted pursuant to Section 556 and 557 of the APA. *Citizens to Preserve Overton Park, Inc. v. Volpe,* 402 U.S. 402, 414, 91 S.Ct. 814, 822, 28 L.Ed.2d 136 (1971).

3) In this case, no FAA hearing under Section 556 and 557 of the APA was conducted because the FAA is not statutorily required to conduct such a hearing by Title 49.

4) Where no formal administrative record has been prepared, or where there are disputes about the contents of the *Overton Park* record of the agency whose decision is the result of informal rather than a formal adjudication, the district court must exercise its general federal question jurisdiction to review the decision in the first instance to resolve all disputed issues of fact.[19] Moreover, the discovery procedures available in the district court are essential to delineate the extent of the administrative record.

As the FAA points out, Suburban O'Hare's argument is premised upon twisting the logic of the Supreme Court's holding in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971). Suburban O'Hare contends that because a "substantial evidence" test is authorized under the APA only when an agency conducts a formal adjudicatory hearing under Sections 556 and Section 557, this requires the reverse: *i.e.*, where, as in Section 1486, a "substantial evidence" test is required, the agency must have conducted a formal Sections 556, 557 adjudicatory hearing. The problem with this argument is that it addresses only the

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[19] Suburban O'Hare contends that the disputed issues of fact in this case include disputes in the following major areas:

"A. The metropolitan aircraft operations demand and the traffic allocation between O'Hare and Midway (i.e., the traffic splits of the metropolitan demand).

B. The 'capacity' of O'Hare to accommodate its share of the metropolitan aircraft operations demand and the delay associated with that capacity assumption.

C. The alternatives to O'Hare expansion to accommodate the forecast aircraft operations demand.

D. The determinations made under Section 176(c) of the Clean Air Act and the related FAA regulations cited in the Complaint."

Suburban O'Hare's Motion For An Order To Compel Federal Defendants To File The Record, at pp. 9-10.

scope of or the standard for judicial review and is not directed at all to the reviewing court's subject matter jurisdiction to conduct the review.

Both the Seventh Circuit and other Circuit Courts of Appeal have held that application of a "substantial evidence" test under Section 1486 is solely a question of the court's scope of review. *Aircraft Owners and Pilots Association v. Federal Aviation Administration,* 600 F.2d 965 (D.C. Cir.1979); *Rombough v. Federal Aviation Administration,* 594 F.2d 893 (2d Cir. 1979); *Starr v. Federal Aviation Administration,* 589 F.2d 307 (7th Cir.1978); *Tiger International, Inc. v. Civil Aeronautics Board,* 554 F.2d 926 (9th Cir.1977), *cert. denied,* 434 U.S. 975, 98 S.Ct. 532, 54 L.Ed.2d 467 (1977). Rather than considering the issue to be a jurisdictional question, these courts clearly considered it only to be related to the scope of judicial review and have resolved it by applying an "arbitrary and capricious" standard to review of Section 1486 orders where no formal adjudicatory hearing was required or conducted.[20]

In *Sima Products Corp. v. McLucas,* 612 F.2d 309 (7th Cir.1980), *cert. denied,* 446 U.S. 908, 100 S.Ct. 1834, 64 L.Ed.2d 260 (1980), the Seventh Circuit squarely held [1030] that any issue over the adequacy or completeness of an administrative record is not a jurisdictional issue. After the district court dismissed for lack of subject matter jurisdiction a challenge to an FAA regulation regarding the use of x-ray devices at airports, the plaintiff argued that the FAA's action could not be an "order" because the administrative record contained disputed issues of fact and was inadequate. The Seventh Circuit rejected this argument, stating:

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[20] As the court stated in *Aircraft Owners and Pilots Assoc. v. Federal Aviation Administration,* 600 F.2d 965, 971 n. 28 (D.C.Cir.1979), there is no real functional difference between the "substantial evidence" and "arbitrary and capricious" tests, and thus this distinction is largely only one of semantics.

> This argument misses the point: a factual hearing before the district court judge is not necessary if judicial review is based on the agency record. *See Investment Company Institute* [*Board of Governors of the Federal Reserve System*], *supra*, 551 F.2d [1270] at 1276 [(1977)], citing Currie & Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 Colum. L.Rev. 1 (1975); Verkuil, *Judicial Review of Informal Rulemaking*, 60 Va.L.Rev. 185 (1974). Moreover, where factfinding within the competence of the agency is required, section 1486(a) permits the case to be remanded to the agency for further factual development if the administrative record is inadequate for review. Under such circumstances it makes no difference whether the reviewing court is a court of appeals or a district court, and 'there seems to be no reason to inject another tribunal into the process.' *Environmental Defense Fund, Inc. v. Hardin*, 138 U.S.App.D.C. 391, 396-397, 428 F.2d 1093, 1098-99 (D.C.Cir.1970).

*Id.* at 313-14.

The Supreme Court has also rejected Suburban O'Hare's argument that where one party disputes the adequacy or factual basis underlying an agency's administrative record, jurisdiction properly rests only in the district court to the exclusion of a statutory grant of exclusive jurisdiction in the Court of Appeals. In *FCC v. ITT World Communications, Inc.*, ____ U.S. ____, 104 S.Ct. 1936, 80 L.Ed.2d 480 (1984), ITT contended, just as Suburban O'Hare contends here, that jurisdiction was vested in the district court under the APA to review FCC orders that were reviewable by statute exclusively in the Court of Appeals because an insufficient record existed, the contents of which ITT disputed. The Supreme Court held that the sufficiency of the administrative record is irrelevant to the jurisdictional issue:

> Respondents contend that these provisions [5 U.S.C. §§ 703, 704] confer jurisdiction in the present suit because the record developed upon consideration of the rulemaking petition by the agency does not enable the Court of Appeals fairly to evaluate their ultra vires claim. *If,*

> *however, the Court of Appeals finds that the administrative record is inadequate, it may remand to the agency, or in some circumstances refer the case to a special master.* Indeed, in the present case, the Court of Appeals has remanded the case to the agency for further proceedings. We conclude that the District Court lacked jurisdiction over respondents' *ultra vires* claim.

104 S.Ct. at 1940. (Citations omitted; emphasis supplied.)

Similarly, in *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 100 S.Ct. 1889, 64 L.Ed.2d 525 (1980), involving a challenge to certain EPA orders in informal adjudications subject to Court of Appeals jurisdiction under § 307(b)(1) of the Clean Air Act, the Supreme Court rejected the view that the district court was the preferable forum because of the availability of discovery to augment the record. The Court noted:

> This is an argument to be addressed to Congress, not to this Court. It is not our task to determine which would be the ideal forum for judicial review of the Administrator's decision in this case. Rather, we must determine what Congress intended when it vested the courts of appeals with jurisdiction under § 307(b)(1) to review "any other final action." The language of the statute clearly provides that a decision of the sort at issue here is reviewable in a court of appeals, and nothing in the legislative [1031] history points to any different conclusion.

446 U.S. at 593, 100 S.Ct. at 1898. (Citations omitted; footnote omitted.)

And, in following the holding of the Supreme Court in *ITT, supra*, the District of Columbia Circuit rejected its own prior precedents, cited here as well by Suburban O'Hare, stating, "We find untenable any suggestion that appellate review of nonfinal agency action may be inadequate due to Court of Appeals' inability to take evidence." *Telecommunications Research and Action Center v. FCC*, 750 F.2d 70 (D.C.Cir.1984).

Surburban O'Hare's attempt to distinguish these cases on the basis that they involved orders that resulted from "rulemaking" rather than "informal adjudication" is unavailing. *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 100 S.Ct. 1889, 64 L.Ed.2d 525 (1980), clearly did involve the review of orders that can only be properly characterized as "informal adjudications" as is plainly apparent from the Supreme Court's description of those orders as "agency action predicated on neither formal adjudication nor informal rulemaking . . . ." 446 U.S. at 593, 100 S.Ct. at 1898. In addition, the authorities heavily relied upon by Suburban O'Hare in support of their argument that district court review in the first instance is most proper whenever informal agency adjudication is at issue, Professors David Currie and Frank Goodman, emphasize that the distinctions they had drawn between informal adjudication and formal rulemaking are not clean cut:

> Informal adjudication, we repeat, frequently does generate an administrative record suitable for the purpose of review. Moreover, scholars and practioners of administrative law are coming to recognize a need for greater procedural regularity in the field of informal agency action. The reforms they contemplate—including a requirement that the adminstrator state the facts and reasons upon which he bases his decision—would, as a byproduct, yield more adequate records.

Currie and Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 Colum.L.Rev. 1, 57-58 (1975) (footnotes omitted).

Particularly in this light, it is significant that the administrative record of the November 14, 1984 FAA decision in this case filed in this Court on February 22, 1985 is voluminous, it is well in excess of 10,000 pages, and it contains both hearing transcripts and public comments. Although this Court makes no finding as to the adequacy of the record or as to whether the record does in fact contain certain allegedly missing crucial "data, calculations and methodology" or resolve Suburban

O'Hare's allegations of disputed issues of fact, any challenge to the adequacy of the record is not jurisdictional. Moreover, given limited judicial resources, a review of the administrative record for its adequacy should be accomplished only once, most properly by the Court of Appeals under Section 1486.

Thus, although some courts once considered judicial review provisions based upon agency "orders" as contemplating "review of a decision based on evidence presented in a quasi-judicial proceeding . . ." *United Gas Pipe Line Co. v. Federal Power Comm'n.*, 181 F.2d 796, *cert. denied*, 340 U.S. 827, 71 S.Ct. 63, 95 L.Ed. 607 (1950), that view is no longer valid. *See Investment Company Institute v. Board of Governors*, 551 F.2d 1270, 1276-1277 (D.C.Cir.1977). Review statutes covering "orders" have been extended now to cover regulations, informal rulemaking, informal adjudications, and any other decision capable of review on the basis of an agency record of any kind, sufficient or insufficient.

Suburban O'Hare devotes much effort to asserting that the legislative history of the APA indicates that Congress intended that trial type hearings would be required when a party asserts that an agency's decision is based on disputed issues of fact. Even Suburban O'Hare concedes, however, that its argument is foreclosed by the Supreme Court's decision in *Citizens to Preserve* [1032] *Overton Park v. Volpe*, 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971).[21] That identical suggestion was strongly rejected by the District of Columbia Circuit in *The Izaak Walton League of America v. Marsh*, 655 F.2d 346, 362 and n. 38 (D.C. Cir.1981). This Court rejects Suburban O'Hare's argument as well because it suggents too much: in essence, it inevitably leads to the conclusion that any time a party merely alleges that the agency's administrative record is

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[21] Nonetheless, it proceeds to suggest that this Court should overrule the *Overton Park* decision of the Supreme Court because it is allegedly unconstitutional. Needless to say, this Court politely declines such a bold invitation.

insufficient, or that it is based on disputed fact issues, a special judicial review statute that vests exclusive jurisdiction in the Court of Appeals is immediately set aside in favor of jurisdiction in the district court.

[11] In the aftermath of the Supreme Court's decision in *FCC v. ITT Industries, Inc.*, it is clear that where an agency conducts inadequate fact finding procedures resulting in an administrative record based on substantial disputed issues of fact, the appropriate remedy is not *de novo* fact finding in the district court, but remand by the Court of Appeals to the agency, where the agency can provide adequate additional fact finding under its statutory mandate. *See Vermont Yankee v. Natural Resources Defense Council*, 435 U.S. 519, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978). Another alternative, suggested by the Supreme Court in *FCC v. ITT World Communications, Inc., supra* 104 S.Ct. at 1940, is the appointment of a special master by the Court of Appeals. *See* 28 U.S.C. § 2347(b)(3). In any event, where Congress has selected and mandated jurisdiction in the Court of Appeals, the appropriate forum for judicial review of a challenged agency decision cannot shift from the Court of Appeals to the district court depending upon the adequacy or inadequacy of the administrative record.

## CONCLUSION

For the reasons set forth in this Opinion, this court holds that jurisdiction to review the November 14, 1984 FAA decision vests exclusively in the Court of Appeals under 49 U.S.C. § 1486 in the first instance and that this Court lacks jurisdiction. Accordingly, the complaint is dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure.

**US DEPARTMENT OF TRANSPORTATION**

**Federal Aviation Administration**

NOV. 14, 1984

Mr. Thomas Kapsalis
Commissioner
Department of Aviation
City of Chicago
City Hall, Room 1111
Chicago, IL 60602

Dear Mr. Kapsalis:

Chicago O'Hare International Airport
Airport Layout Plan Approval

This letter approves the Airport Layout Plan (ALP) dated March 1984 for Chicago O'Hare International Airport, submitted by your letter dated April 9, 1984. Two copies of the ALP are enclosed. The airport development plan approval is based upon recognition of and adherence to the following:

1. Approval of the ALP is not to be considered as a determination of necessity or as a commitment of Federal funding for accomplishment of the project development. Inclusion of the proposed development signifies a concurrence for planning purposes based on review of conformance with current standards for safety, utility, and efficiency. Actual facility development will be governed by adherence to development standards applicable at the time the development is undertaken.

2. A Final Environmental Impact Statement (FEIS) was approved May 31, 1984. Mitigation and other conditions established in the FEIS, this ALP approval letter, and other related Federal documents, shall be carried out when the development plan is implemented. They are listed in

the enclosed Summary of Environmental Mitigation and Other Provisions, which are a condition of this ALP approval.

3. Airport Improvement Program requirements stipulate that all development programs be reasonably consistent with the plans of planning agencies for the development of the area in which the airport is located, that fair consideration has been given to the interest of communities in or near the airport, and that development programs provide for the protection and enhancement of the quality of the environment.

4. Reviews of the landing area development proposed on the plan were conducted in accordance with Parts 77, 152 and 157 of the Federal Aviation Regulations. Based on consideration of safe and efficient use of airspace, the FAA offers no objection to the proposed ultimate airspace utilization as depicted on the development plan, subject to compliance with the enclosed Airspace Review Comments. The development plan will be afforded the status of a plan on file for the purpose of Federal Aviation Regulation Part 77 obstruction evaluations and Part 152 airport aid program.

This review did not include an evaluation of actual construction for which separate notice is required under Part 77 of the Federal Aviation Regulations. Prior to constructing any facility, structure or other items on the airport, notice consistent with requirements of Part 77 must be filed and evaluated (FAA Form 7460-1, or Preapplication for Federal Assistance).

If action or construction is planned without Federal aid which will change the status or geometrics of runways, taxiways, aprons or other operating areas of the airport, notice must be filed in accordance with Part 157 (FAA Form 7480-1)

We trust the foregoing provides a reasonable explanation of the conditions inherent in our approval. If, however, you desire further clarification, please contact this office.

Sincerely,

/s/ JOHN GUIDOTTI

*Supervisor, Illinois Section*
Chicago Airports District Office

Enclosures

# RECORD OF DECISION

# AIRPORT LAYOUT PLAN

# CHICAGO O'HARE INTERNATIONAL AIRPORT



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# RECORD OF DECISION

## AIRPORT LAYOUT PLAN
## CHICAGO O'HARE INTERNATIONAL AIRPORT
## CHICAGO, ILLINOIS

### 1. Proposed Action

The proposed Federal action consists of the approval of an Airport Layout Plan submitted by the City of Chicago, Department of Aviation, for Chicago O'Hare International Airport.

### 11. Introduction and Background

Chicago O'Hare International Airport is the world's busiest airport and a vital part of the nation's transportation system as well as of the Chicago Metropolitan Area.

The City of Chicago conducted a Master Plan Study for O'Hare Airport that was financed in part with Federal funds in four (4) separate grants issued under the Airport and Airway Development Act of 1970 (P.L. 91-258) and its amendments. As part of that Study, an Airport Layout Plan was developed which shows the existing and proposed facilities that the City of Chicago considers to be necessary for the operation and continued development of the airport. Also, as a part of that Study, an Environmental Assessment was prepared for the proposed development.

The proposed development plan originally was separated into three phases. Phase I encompassed the initial development that was to begin in the 1982-83 time period, Phase II included development occurring from 1983 to 1987, and Phase III included development to be done after 1987. The Phase I development was assessed separately and a Finding of No Significant Impact was approved July 22, 1982, for the Federal action of approving an Interim Airport Layout Plan. The Interim Airport Layout Plan was approved July 30, 1982. The major Phase I development items are: new terminal and

concourse for Delta Airlines, bay expansion in Terminals 2 and 3, relocated flight kitchens and airport maintenance facility, and an inter-terminal people mover system. Phases II and III were subsequently combined into a single phase. The Environmental Assessment that was prepared covered the cumulative impacts associated with the Phase I development and the combined Phases II and III.

On April 9, 1984, the City of Chicago submitted its completed Airport Layout Plan to the Federal Aviation Administration (FAA) for approval. The FAA prepared a Final Environmental Impact Statement (FEIS) for the proposed development and approved it on May 31, 1984.

An aeronautical study of the Airport Layout Plan was conducted by the FAA, including circularization to the public from May 15, 1984 to June 15, 1984. No objections were received as a result of the circular. Based on that study, the Airport Layout Plan was determined to be acceptable from an airspace utilization standpoint.

Approval of the Airport Layout Plan does not represent approval as far as necessity for the development is concerned nor is it a commitment of Federal funds for any future development. It signifies a concurrence for planning purposes based on review of conformance with current standards for safety, utility, and efficiency.

**III. Issue**

The question of whether O'Hare Airport needs to expand and improve its facilities has been under study for some time. It is a question which involves matters of public policy in terms of social, economic, and environmental issues. It is a question on which there has been some disagreement expressed, both substantively and in terms of the weight which should be given to each of these factors.

The issue is whether to approve the Airport Layout Plan submitted by the City of Chicago. Approval of it would allow the City to proceed with implementing the proposed development at the airport and to request Federal funds for eligible items of development. Not approving it would prevent the City from proceeding with the development in a timely manner.

Generally, Section 2(b)(1) of the Department of Transportation Act of 1966, charges the Secretary of Transportation with the responsibility "to assure the coordinated, effective administration of the transportation programs of the Federal Government, to facilitate the development and improvement of coordinated transportation service... and to provide general leadership in the identification and solution of transportation problems." More specifically, under the Federal Aviation Act of 1958, as amended by the Department of Transportation Act of 1966 which transferred aviation policy function and duties to the Secretary, the Secretary is responsible for the "promotion, encouragement, and development of civil aeronautics" and fostering "the development of civil aeronautics and air commerce in the United States", and giving "full consideration to the requirements... of commercial and general aviation".

In the Airport and Airway Improvement Act of 1982, Congress declared that "the continuation of airport and airway improvement programs and more effective management and utilization of the Nation's airport and airway system are required to meet current and projected growth of aviation and the requirements of interstate commerce, the Postal Service, and the national defense."

**IV. Policy Considerations**

All grant agreements with the City of Chicago for O'Hare Airport under the Airport and Airway Development Act of 1970 and the Airport and Airway Improvement Act of 1982 include the following assurance by the City of Chicago:

*Airport Layout Plan.* It will keep up to date at all times an airport layout plan of the airport showing (1) boundaries of the airport and all proposed additions thereto, together with the boundaries of all offsite areas owned or controlled by the sponsor for airport purposes and proposed additions thereto; (2) the location and nature of all existing and proposed airport facilities and structures (such as runways, taxiways, aprons, terminal buildings, hangars and roads), including all proposed extensions and reductions of existing airport facilities; and (3) the location of all existing and proposed nonaviation areas and of all existing improvements thereon. Such airport layout plan and each amendment, revision, or modification thereof, shall be subject to the approval of the Secretary which approval shall be evidenced by the signature of a duly authorized representative of the Secretary on the face of the airport layout plan. The sponsor will not make or permit any changes or alterations in the airport or in any of its facilities other than in conformity with the airport layout plan as so approved by the Secretary if such changes or alterations might adversely affect the safety, utility, or efficiency of the airport.

FAA Order 5050.4, Airport Environmental Handbook, prescribes that approval of an airport layout plan is a Federal action subject to the National Environmental Policy Act of 1969 for which an environmental assessment must be prepared and processed.

In the Consent Decree entered October 14, 1982 in *State of Illinois v. Butterfield, et al,* the City of Chicago agreed to present the entire Master Plan development for O'Hare Airport to the FAA as a single, comprehensive submission and the FAA agreed to process an EIS with respect to the submitted development.

The FEIS assessed the overall development program and the cumulative impacts associated with it. In this regard, it is the policy of the Department of Transportation to reduce adverse impacts on the quality of the human environment which result from transportation decisions. This is consistent with our responsibilities under the National Enviromental Policy Act of 1969 "to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill social, economic, and other requirements of present and future generations of Americans".

Section 1505.2(b) of the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act issued by the Council on Environmental Quality states that a record of decision shall identify all alternatives considered by the agency in reaching its decision. The proposed development, as depicted on the ALP, includes a great many interrelated projects. Due to the complex and interrelated nature of the development projects, this Record of Decision specifically identifies all alternatives to the development as a whole. However, rather than identifying each of the alternatives to specific projects within the overall development, this Record of Decision hereby specifically incorporates by reference each of those alternatives considered in the FEIS into this document. Each of those alternatives has been fully considered even though not individually identified. It is believed that this method is in keepig with the requirements of CEQ 1505.2(b) as well as Section 1505.2 which provides that the Record of Decision shall be concise.

## V. Alternatives to Proposed Development Program

The FEIS considered the following alternatives to the proposed development program:

a. *Alternative Modes of Travel.* Alternative modes such as rail, bus, and automobile cannot satisfy the needs of the majority of travelers who take trips of more than 250 miles from the Chicago area and are not acceptable substitutes for efficiency provided by air travel.

b. *Utilization of Other Airports.* The only other airport that currently provides commercial air carrier service to the Chicago Metropolitan Area is Midway Airport which is being improved to accommodate a limited increase in service to selected cities, but cannot be adequately expanded to handle the increased demand and needs of the Chicago Metropolitan Area. The Greater Rockford Airport and General Mitchell Field in Milwaukee are too distant for most Chicago area travelers and are not suitable alternatives.

c. *Development of New Airport.* Development of a new major air carrier airport was considered several times in the past, as well as in the recently completed Master Plan Sutdy. This alternative was not selected because of difficulties in finding a suitable site, the extremely high costs of acquisition and development of a new site, and the long lead time to make it operational. Development of another air carrier airport to serve the Chicago Metropolitan Area will be studied again as part of a State System Plan to be prepared by the Illinois Department of Transportation under a series of grants to be funded by the FAA's Airport Improvement Program. The initial grant was issued in September 1984.

d. *Alternative Levels of Aviation Demand.* The expansion plans for O'Hare Airport were prepared after a selection was made by the City of Chicago from six (6) demand alternatives which are discussed in the FEIS. They considered constrained and unconstrained levels of aviation demand, and included alternative roles to be played by O'Hare and Midway Airports. The City of

Chicago decided to pursue a constrained development for O'Hare Airport that would limit the future growth to that which could be handled by the existing runways and available land and by assuming improved air traffic control capabilities to accommodate increased operations.

e. *Do Nothing.* Under this alternative, there would be no additional or expanded facilities at O'Hare Airport. This alternative was rejected because it would result in a reduction of effective gate capacity due to use of more wide-body aircraft and an increase in aircraft operational delays. Also, it would fail to correct existing deficiencies in congestion of aircraft, automobiles, and passengers. In addition, under this alternative, which the FEIS refers to as "Without Project", the future noise and air pollution would be greater than the "With Project".

**VI. Proposed Development**

The environmentally preferable alternative is the proposed overall development program as shown on the ALP and as assessed in the FEIS. The program is comprised of many individual projects, each of which had alternatives. As mentioned above under Policy Considerations, the projects and alternatives were too numerous to be included herein. All of them, which are incorporated herein by reference were considered in this Record of Decision. The selected major on-airport projects are described below:

a. *Central Core Facility.* The alternative selected for domestic air carrier terminal and gate facilities was to develop them in the existing central core area of the airport. It will include constructing new Terminal 1 and concourse, apron expansion, concourse extensions, taxiway relocations, service road relocation, commuter concourse relocation, terminal access road modifications, and taxicab staging area relocation. This concept will keep the domestic carrier facilities together and permit maximum use of the central core area.

b. *International Terminal Facility.* The existing inadequate international terminal will be displaced by the new Terminal 1 and concourse mentioned above. Facilities to accommodate international carriers and travelers must be located on the airport. The existing cargo area was the selected alternative for the site of the new international carrier facility. In addition to a terminal building, it will include aircraft parking apron, taxiway connectors, auto parking, and access road. This location will facilitate passenger connections with the domestic carriers.

c. *General Aviation Facility.* The existing general aviation facility will also be displaced by the new Terminal 1 and concourse. The alternative selected was to develop a new general aviation facility east of the relocated commuter facility, which will be east of the new international terminal complex.

d. *Cargo Complex.* The need for new and expanded cargo facilities will be met by the selected alternative of developing a cargo complex in the southwest part of the airport. It will consist of cargo/freight forwarding buildings, aircraft parking ramps, taxiway connectors, and access roadways for connectors to the central core and to Irving Park Road.

e. *People-Mover System.* Completion of the people-mover system covered in the Phase I Environmental Assessment was the alternative selected to move the passengers between the various terminals as well as the remote parking lots. The system will consist of an inter-terminal shuttle segment and links to future terminals and remote parking lots.

f. *Runways and Taxiways.*

(1) Runway 9L/27R extension and associated taxiways—To provide additional flexibility in oper-

ational capability of the airfield, the alternative selected was to add 550 feet at the east end of Runway 9L/27R and 790 feet at the west end.

(2) Partial parallel and exit taxiways for Runways 9R/27L and 14R/32L—To provide aircraft access to the future cargo complex, the alternative selected was to add partial parallel taxiways on the cargo area side of Runways 9R/27L and 14R/32L and exit taxiways for Runways 9R/27L and 14R/32L.

(3) Runway 14R/32L extension—To reduce wake turbulence interference with aircraft departing from Runway 27L, the alternative selected was to extend Runway 14R/32L by 1400 feet to the southeast. This would allow heavy aircraft landing on Runway 32L to touch down before the intersection with Runway 9R/27L.

(4) Runway 14R/32L partial dual parallel taxiway—To provide additional flexibility for the ground movement of aircraft, the alternative selected was a new partial parallel taxiway east of the existing parallel taxiway for Runway 14R/32L.

(5) Taxiway connection to Runways 32L and 4R—To facilitate the movement of aircraft to and from the new cargo complex, the alternative selected was to construct taxiways between the cargo complex and the southeast end of Runway 14R/32L and the hold pad at the southwest end of the parallel taxiway for Runway 4R/22L.

(6) Aircraft hold pads—Other development will cause the displacement of the existing penalty box alongside the parallel taxiway for Runway 14R/32L and the hold pad at the southeast end of Runway 14L/32R. The alternative selected to replace them

was to construct two new hold pads, which are needed to hold arriving aircraft that have to wait for a terminal gate to become avai able.

(7) Additional taxiway bridge—A second taxiway access is needed between the eastern portions of the terminal complex and the east end of the north airfield side. The alternative selected was to construct a second taxiway bridge over the airport entrance road.

g. *Ground Access.*

(1) Northwest Tollway Access—The alternative selected to relieve traffic congestion on the primary airport entrance road was to provide the Northwest Tollway with a new eastbound exit and a new westbound entrance at the north side of the airport.

(2) Old Mannheim Road—To handle the increased traffic due to the proposed Northwest Tollway access, the alternative selected was to upgrade Old Mannheim Road.

(3) Zemke Road—To facilitate traffic flow between Mannheim Road and Old Mannheim Road, the alternative selected was to relocate Zemke Road, which currently connects them, to intersect the two roads south of the existing intersections.

(4) Southeast Service Site Access and Service Road— Access is needed between the new Southeast Service Site and the main airport service road for vehicles traveling to and from the flight kitchens and airport maintenance complex. The alternative selected was to provide an on-airport road connection to the main service road and an access from off-airport.

(5) Western Access—To provide access to the airport from the west, the alternative selected was a

roadway connection at York Road plus a remote parking lot and a people-mover system. The access is conceptual only at this time and will be modified to show planned alignments, Thorndale Avenue extension, etc., when those plans are prepared in the future. The Illinois Department of Transportation indicates an Environmental Impact Statement will be prepared prior to selection of the final alignment. it will consider the impacts associated with airport related traffic for each alignment.

h. *Parking Facilities.*

(1) East Remote Site—A new parking lot on the east and west sides of old Mannheim Road was the alternative selected to provide additional long-term parking. It will be convenient to the new Northwest Tollway access and to the new people-mover system.

(2) Rent-A-Car—The alternative selected for additional rent-a-car facilities was to expand the existing rent-a-car parking and staging areas.

(3) North Remote Parking—To provide additional long-term parking in the post-1990 time period, the alternative selected was to construct a parking lot in the northern portion of the airport adjacent to the proposed Northwest Tollway access.

i. *U. S. Post Office.* The new International Terminal Facility will cause displacement of the U.S. Post Office facility. The alternative selected was to build a new facility at a site south of the proposed new cargo complex.

j. *Heating and Refrigeration Plant.* To satisfy the increased capacity requirement for heating and cooling the central core facilities, the alternative selected was to expand the existing Heating and Refrigeration Plant.

k. *Crash, Fire and Rescue (CFR) Facility.* Relocation of the inner/outer taxiway system will cause displacement of the main CFR station. The alternative selected was to build a new station in the northeast corner of the cargo complex.

l. *Military Facilities.* A proposed land exchange between the City of Chicago and U.S. Air Force to provide land for a remote parking lot will involve replacement of some military facilities. The alternative selected was to replace the facilities on land at the airport that is already owned by the U. S. Air Force and land that will be deeded to it by the City of Chicago.

**VII. Affected Environment**

O'Hare Airport is surrounded by communities, including the City of Chicago, which are for the most part fully developed. Current land uses and zoning indicate a high level of residential use, a considerable amount of industrial use, and scattered commercial areas. Typical community facilities such as schools, libraries, hospitals, nursing homes, parks, and forest preserves are also affected.

**VIII. Environmental Considerations**

a. *Noise and Land Use.* Data in the FEIS shows that in 1982, there were approximately 286,320 people exposed to noise levels of 65 Ldn or greater. By 1995 that number would be increased to approximately 298, 686 "without" the proposed development and decreased to approximateyly 278,766 "with" the proposed development due primarily to resultant changes in the noise contours. Although there would be a net decrease in the total population exposed to 65 Ldn or greater, some areas would receive higher noise levels. The data showed a similar net decrease in the number of exposed noise sensitive community facilities such as schools, libraries, hospitals, nursing homes, parks and forest preserves. At the same time, some individual facilities would experience higher noise exposure

levels. The following mitigating measures are in effect or proposed:

(1) Federal grants have been issued to fund 80% of the costs to soundproof one school in Schiller Park, one in Des Plaines, and one in Bensenville, the City of Chicago is contributing 10% of the cost and the local school districts are contributing the remaining 10%. The City of Chicago will extend its participation in soundproofing of schools to include those within the 70 Ldn "with project" noise contours for 1995. The three schools already in the soundproofing program are in the 75 Ldn noise contours. An additional 23 schools would be included for consideration under the extended program.

(2) Federal Aviation Regulation (FAR) Part 91, Subpart E, mandates lower noise limits for aircraft engines to comply with FAR Part 36. Based on Part 36, by January 1, 1985, approximately 86% of the national fleet will be in compliance and by January 1, 1988, all aircraft will be in compliance.

(3) The O'Hare Advisory Committee (OAC) that was formed in February 1982, has been an effective panel for communities to participate in discussions concerning plans and operations for O'Hare Airport. It is a permanent committee until June 30, 1995, but it should be continued beyond that date.

(4) Nighttime noise abatement procedures were tested from January 2, 1984, to April 30, 1984, using FAA's Draft Tower Order 7110.13E. The draft order contained changes to provide nighttime noise relief by using runway configurations and departure headings to direct aircraft over less populated areas. Those changes were recommended by the O'Hare Technical Working Group made up of representatives of the Suburban O'Hare Commission, the FAA, the Air Transport Association, and the City of

Chicago. The OAC is expected to make a recommendation as to noise abatement improvements. The OAC has a Noise Abatement Sub-Committee that meets regularly to discuss and seek ways of reducing noise impacts. An environmental assessment of the impacts of the draft tower order will be made prior to implementing the tower order.

(5) Under the Agreement entered into October 14, 1982, as part of the settlement in the matter of *State of Illinois v. Butterfield, et al,* the City of Chicago and the other communities in the vicinity of O'Hare shall take feasible and reasonable steps to discourage the further development of incompatible land uses around O'Hare Airport and to reduce existing incompatible land uses. The OAC has a Land Use Sub-Committee to find ways of minimizing land uses that are incompatible with the airport. As a part of this effort, the City of Chicago, through its aviation consultant, has contracted with the Northeastern Illinois Planning Commission to prepare a Land Use Compatibility Assistance Program for use in assisting local governments to foster land use compatibility.

(6) To develop a long-term noise compatibility plan, the City of Chicago will prepare Noise Exposure Maps and a Noise Compatibility Program in accordance with FAR Part 150, Airport Noise Compatibility Planning, which implements The Aviation Safety and Noise Abatement Act of 1979. This effort should have the cooperation of the affected communities and should result in noise abatement and land use alternatives that can be implemented. Noise compatibility projects recommended in the above-mentioned program are eligible for Federal grants under the Airport and Airway Improvement Act of 1982.

(7) For the more severely impacted residents, the City of Chicago will initiate a program to purchase single family dwellings of residents in existing and future 80 Ldn noise

contour areas who volunteer to sell their homes. Those homes would be purchased only if the property is then rezoned to a compatible land use.

(8) Noise barriers/berms will be constructed by the City of Chicago on airport property to reduce the noise on nearby off-airport areas from ground operations of aircraft.

(9) The City of Chicago, with the cooperation of the FAA and the airlines, will initiate and monitor a noise abatement departure profile procedure starting no sooner than January 1, 1985. Results of the monitoring will be furnished periodically to the OAC to determine effectiveness of the procedures. This procedure will also be considered in the FAR Part 150 program.

(10) Use of preferential flight tracks should continue to be studied and implemented based on recommendations of the OAC. These flight tracks will also be considered in the FAR Part 150 program.

(11) The City of Chicago will institute and enforce procedures to deny intersection departure clearances for aircraft operating during nighttime hours when noise restrictions are in effect.

b. *Social Impacts.* The proposed land transfer between the City of Chicago and the U.S. Air Force will cause the relocation of a military-occupied mobile home park and Visiting Officers Quarters. They will be relocated to new facilities within the military area of the airport, with beneficial effects because the new facilities will be better than the existing ones.

One off-airport residence also may be displaced, depending on the alignment of the proposed Northwest Tollway access. Displacements will be accomplished in accordance with the provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970. No off-airport businesses will be relocated because of the airport development.

Physical disruption of established communities will be limited to relocation of the military mobile home park, the Visiting Officers Quarters, and possibily one off-airport residence.

Based on coordination with the Northeastern Illinois Planning Commission, the airport development is not expected to affect orderly, planned development around the airport nor be in conflict with it.

Vehicular traffic around the airport will be affected, but all improvements and modifications of off-airport roads, highways, and accesses will be coordinated with the appropriate transportation planning agencies so as to minimize disruptions and to provide an effective means of handling the increased traffic.

c. *Induced Socio-Economic Impacts.* O'Hare Airport is a tremendous economic asset to the Chicago Metropolitan Area, especially the City of Chicago and other communities in the vicinity of the airport. The proposed development will generate significant increases in direct, indirect, and induced employment, payroll, and expenditures that will benefit the entire area.

d. *Air Quality.* National Ambient Air Quality Standards (NAAQS) were established to protect the public health and welfare with an adequate margin of safety. State standards were established in Illinois that conform with the national standards. In addition to the establishment of standards, the State of Illinois has developed a State Implementation Plan (SIP) to define the process by which pollution control goals will be achieved.

The analysis of air quality impacts contained in the FEIS indicated that standards with respect to Carbon Monoxide (CO) and Nitrogen Oxides (NOx) are predicted to be exceeded at several receptor points in the future, with or without the proposed project. Results of calculations done in 1979, contained in Appendix G of the FEIS indicate standards for CO

were exceeded. Additionally, high pollutant concentrations have been identified for on-airport and off-airport receptors for both CO and NOx.

The Clean Air Act requires the Administrator of the United States Environmental Protection Agency (USEPA) to "review and comment in writing on the environmental impact of any matter relating to duties and responsibilities granted pursuant to this Act or . . . any major Federal agency action to which Section 102(2)(C) of P. 1. 91-190 applies . . . . " Section 176(c) of the Clean Air Act Amendments of 1977, states in part that no Federal agency shall engage in, support in any way, or provide financial assistance for, license or permit, or approve any activity which does not conform to the approved SIP.

The USEPA reviewed the FEIS and initially expressed concern that the national standards for Carbon Monoxide and Nitrogen Oxides would be exceeded at several sites where the public has access, including a residential area, unless adequate mitigation measures are provided. It was agreed that mitigation measures previously identified by the City of Chicago would be quantified and applied to the worst case scenario. Additionally, to assure a high level of confidence in the modeled results, it was agreed that background levels specified by the USEPA would be added to the worst case calculation.

The FAA assembled a six-point program to address the concerns expressed by the USEPA and to assure compliance with the Clean Air Act. This program includes:

1. The incorporation of background levels in the worst case meteorological conditions;

2. A commitment to implement measures to offset significant environmental impacts;

3. An assurance of conformity with the State Implementation Plan (SIP);

4. A commitment to implement an air quality monitoring program;

5. The reevaluation of air quality, using an analysis based on monitoring; and

6. The reevaluation of mitigation measures.

The above listed program was transmitted to the USEPA on September 27, 1984, for review and comment. That transmittal included Item 1, air quality data with background levels incorporated; and Item 3, a copy of the assurance of conformity with the SIP. Program Item 2 is a commitment by the City of Chicago to implement measures to offset significant air quality impacts. In their letter of October 23, 1984, the USEPA stated that the program adequately addressed their concerns regarding predicted violations of the eight-hour carbon monoxide and the annual nitrogen oxide air quality standards. Item 4 is a commitment by the City of Chicago to install air quality monitoring equipment. Items 5 and 6, regarding reevaluation based on monitoring, are the responsibility of the FAA. The reevaluation is to be based on an independent analysis with background levels established by field monitoring.

The following mitigation measures would be included as conditions in the approval of the O'Hare Airport Layout Plan:

1. Conversion of Employee Parking Lot E to public use;

2. Adjustment of the Northwest Tollway access road speed designation (limit) to 40 mph;

3. Reduction of the parking capacity of the East Remote Parking Lot to 3,000 spaces;

4. Reduction of aircraft engine use during the delay mode; and

5. Development and implementation of airport terminal access flow controls for the roadway.

These mitigation measures have been determined by the USEPA to be adequate interim control procedures. The measures will be reevaluated based on a two year monitoring effort to be undertaken by the City of Chicago and coordinated with the USEPA and Illinois State EPA. The determination of the need for additional mitigation measures will be made in consultation with the USEPA and based on the results of the reevaluation.

To promote the enhancement of the human environment, the USEPA recommended that certain mitigating measures be implemented as soon as possible because of the potential improvement to existing air quality. They identified the following measures for early implementation:

- Pricing mechanisms and facilities to encourage the use of remote lots for passenger delivery and pickups (City of Chicago).
- Reduction of the number of operating engines on aircraft holding on the ground when delays exceed twenty (20) minutes. (Air Transport Association).

The FAA endorses these recommendations and will encourage those responsible for implementation to do so as soon as practicable.

Consultation pursuant to Section 1506.10(d) of the Council on Environmental Quality Regulations has been completed with respect to air quality. The USEPA has stated that their air quality concerns have been adequately addressed.

e. *Water Quality.* The three existing creeks that flow through airport property carry runoff from both off-airport and on-airport surface areas. Measures already being taken to reduce or eliminate pollutants generated by the airport from the effluents being discharged include oil separators at Lake O'Hare, a connection to the Metropolitan Sanitary District System and expanding the storm water detention capacity of

Lake O'Hare. Designs of the various facilities to be developed will incorporate provisions to minimize water quality impacts, including any that may be caused during the construction stages. The water quality of the creeks and Lake O'Hare will continue to be monitored by airport personnel. There are no anticipated adverse impacts on the ground water quality.

The increased demand for potable water can be accommodated by the existing water supply system that serves the airport. The increased wastewater volumes will be handled by new sanitary sewers that will flow into the existing City of Chicago and Metropolitan Sanitary District sewer and treatment systems.

f. *Department of Transportation Act Section 4(f).* The proposed development will not use nor have a significant adverse effect on the use of any publicly owned park, recreation area, wildlife or waterfowl refuge, or historic site of local, state, or national significance.

g. *Historic, Architectural, Archeological and Cultural Resources.* The proposed development will not significantly affect any historic, architectural, archeological and cultural resources.

h. *Biotic Communities.* The proposed development will cause no significant impacts on biotic communities.

i. *Endangered and Threatened Species of Flora and Fauna.* The proposed development will not affect any endangered or threatened species of flora and fauna.

j. *Wetlands.* There are two areas on the west side of the airport that support standing water and could be affected by development of a western access and a remote parking lot. The primary impact on those areas would be a loss of storm water retention capacity, which will be mitigated by providing compensatory areas in the plans for those projects.

k. *Floodplains/Stormwater Runoffs.* Portions of designated floodplains are on airport property. No off-airport floodplains will be affected by the proposed development. The airport floodplains will be encroached by the new cargo complex, relocated military facilities, Northwest Tollway access, north remote parking lot, and relocated Post Office facility. Water detention basins and swales and retention basins that are planned should minimize or eliminate the floodplain conditions at the above mentioned sites. The Post Office facility will be in an area from which the floodplain will be eliminated. Prior to their construction, all of the facilities will be designed and engineered to meet all requirements and obtain all necessary approvals and permits that are applicable to their construction and location. None of the proposed development items is in a special flood hazard area.

The proposed development will cause an increase in the volume of stormwater runoff, primarily because of the covering of permeable surfaces by structures and pavements. The following planned measures will mitigate the effects of the increased runoff:

(1) Construction of additional storm sewers to Lake O'Hare.

(2) Expanded storm water detention capacity of Lake O'Hare. This expansion was recently completed.

(3) Construction of storm water retention basins and detention basins and swales.

l. *Coastal Zone Management Program.* This is not applicable because the airport area is not in a coastal zone.

m. *Prime and Unique Farmland.* The proposed development will not affect prime or unique farmland.

n. *Energy Supply and Natural Resources Development.* The increased demand for electricity and natural gas can be satisfied by the local utility companies. Fuel consumption by vehicles traveling to and from the airport will be minimized by development of the Northwest Tollway access, provisions for western access, and remote parking lots, which will all reduce vehicular travel distances. There will be an increase in the fuel consumption of aircraft because of the projected increase in operations, but measures will be taken to minimize avoidable delays. Ground service vehicles will also consume more fuel because of increased activity. It is anticipated that the increased fuel needs can be accommodated.

o. *Light Emissions.* No significant adverse impacts are anticipated from light emissions.

p. *Solid Waste Impact.* The increased amount of solid waste that will be generated can be disposed of in the same manner as the current amount through the use of City of Chicago and commercial disposal firms, landfill sites and incinerators.

q. *Construction Impacts.* Through the anticipated use of prudent engineering and construction practices, adverse soil erosion, water quality, and air quality impacts will be minimized. The noise impacts from construction equipment will be mostly on the airport and away from the airport's perimeter. Earth berms that are being constructed will act as a sound barrier as well as visually shielding construction activities from nearby residents and businesses. There will be a minor increase in truck traffic by vehicles delivering materials to the construction sites.

During the construction activities, there will be some disruption of airport operations and inconveniences to passengers, but measures are being taken by the many organizations

and agencies involved to coordinate the scheduling and accomplishment of the work to minimize the disruptions and inconveniences.

The construction projects will stimulate significant beneficial economic impacts during the period of 1984-1995 by construction-related employment, income, and expenditures, plus other induced benefits.

**IX. Other Considerations**

a. The City of Chicago processed its environmental assessment of the proposed airport development through the OME Circular A-95 clearinghouse review process for coordination with State and local agencies. The Illinois State Clearinghouse letter stated that it had received no comments from State agencies that were given the opportunity to comment. The Northeastern Illinois Planning Commission (NIPC), as the regional A-95 review agency, stated that the Master Plan is consistent with the plans and policies of the Commission. The NIPC review statement included recommendations which were subsequently incorporated into the City's environmental assessment.

b. The NIPC review statement enclosed a copy of a letter dated June 20, 1983 from the DuPage County Regional Planning Commission. The letter stated that the environmental assessment for the Master Plan is inconsistent with the plans and policies of the DuPage County Regional Planning Commission and recommended six items that would make it consistent if incorporated. The six items have been adequately addressed in comments that were added into the environmental assessment and were included in the FEIS.

c. The DuPage County Board Chairman sent a letter dated February 16, 1984, to the FAA transmitting comments on the Draft EIS. Responses to those comments are included in the Final EIS and were discussed further at a meeting on May 10, 1984, with the County Board Chairman, other county

representatives, and the FAA. On July 30, 1984, the County Board Chairman sent another letter to the FAA expressing dissatisfaction with the FAA's previous responses, especially with regard to noise, airport capacity, ground transportation/access, and mitigation measures. FAA's reply of September 24, 1984, to the County Board Chairman acknowledged that many issues, including western access, remain unresolved. Some of the County's issues relate to problems that currently exist and some to problems that would be experienced even if the proposed development plan is not implemented. Other issues go beyond the scope of the FAA's jurisdiction.

To partially address the concerns of DuPage County regarding western access, the City of Chicago showed on the ALP a conceptual west connection to York Road and a west remote parking facility. The access point can be modified for the Thorndale Avenue extension when the final alignment is selected by the State of Illinois. The FAA is willing to work with DuPage County on airport related issues that cannot be resolved within the scope of the environmental process.

d. The Suburban O'Hare Commission (SOC), which is an intergovernmental body representing DuPage County and fifteen municipalities in the vicinity of O'Hare Airport, submitted a lengthy list of comments to the FAA on the Draft EIS in a letter of February 16, 1984. SOC commented that the Draft EIS was inadequate and should be completely revised to meet the standards of the National Environmental Policy Act (NEPA). Responses to those comments are contained in the FEIS.

The Draft and Final EIS were prepared and processed in full conformance with Section 102(2)(C) of NEPA. The documents were coordinated with agencies having special expertise and/or jurisdiction by law as required by existing regulations. Correspondence from those agencies indicate that the environmental impacts associated with the proposed development have been adequately addressed.

The majority of SOC's comments criticized the EIS for a lack of mitigating measures, especially operational procedures for noise control. Because nearly all operational procedures proposed by SOC will adversely affect some groups of people, the FAA intends to work through the O'Hare Advisory Committee, which represents most of the local interests.

The City of Chicago and the FAA are committed under *Illinois v. Butterfield* to consider all noise abatement procedures proposed by the O'Hare Advisory Committee. SOC is represented on that Committee. To date, two measures have been proposed to the FAA: the nighttime ground run-up procedure and the nighttime noise abatement procedure (tower order). The nighttime ground run-up procedure is now in effect and a compliance program has been instituted. The nighttime noise abatement procedure (tower order) underwent a 4-month test by the FAA. The test results and comments from communities and SOC were evaluated by the FAA and a determination made that the test objectives were met. It is anticipated that the O'Hare Advisory Committee will make a decision on whether to implement the procedure. An Environmental Assessment would be prepared if a recommendation is made to permanently implement it.

Mitigation measures related to the proposed development are identified on pages 66, 67, 68, 69, 70, 73 and Appendix E, 88, 89, 90, 102, 103, 106, 107, 108 and 109 of the FEIS.

e. The proposed airport development, and the entire Master Plan study from which it evolved, included extensive public involvement and coordination with governmental and planning agencies. A comprehensive public information and community participation program was used by the city of Chicago and its Department of Aviation to inform the public, answer questions, and receive input. Many local meetings were held as part of that program. In addition, two public hearings were held on June 1, 1983 and June 2, 1983 on the environmen-

tal assessment. A transcript of the testimony presented at the public hearings was reviewed by the FAA and the comments were considered in the FEIS. The majority of the objectors criticized the assessment of the noise and air quality impacts. The supporters praised the plan for its economic benefits.

**X. Conclusions**

Based on the information in the FEIS and other subsequent information made a part of the record, it has been determined that all practicable means to avoid or minimize environmental harm from the alternatives selected will be adopted and more specifically that:

a. The proposed development shown in the Airport Layout Plan is reasonably consistent with existing plans of planning agencies for development of the area.

b. Fair consideration has been given to the interest of communities in the area of the airport.

c. Appropriate action will be taken to restrict, to the extent reasonable, the use of land in the vicinity of the airport to purposes compatible with airport operations.

d. Measures will be taken to minimize harm to wetlands that will be affected by proposed development of the west remote parking lot. Paving and filling will be kept to a minimum where there is no practicable alternative. Detention basins and swales are proposed to mitigate adverse effects.

e. Measures will be taken to conform to applicable state and/or local floodplain protection standards in floodplain areas where there is no practicable alternative to the encroachment.

f. Measures will be taken to reduce the noise impacts.

g. Measures will be taken to reduce the air quality impacts.

h. The provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act will be followed if there will be any relocation of people.

**XI. Decision**

The proposed development program minimizes the significant noise and air quality impacts associated with the increased activity that will occur at O'Hare, with or without further development. It has been determined to be the environmentally preferable alternative and it is consistent with the statutory mission of the agency.

The two decision choices available are: (1) to approve the airport layout plan, and (2) to not approve it. Approval signifies that applicable federal requirements relating to airport development planning have been met. It would allow the City of Chicago to proceed with the proposed development at the airport and to request Federal funds for eligible items of development. Not approving it would prevent the City from proceeding with the development in a timely manner.

The decision is based on the recognition of and adherence to the following:

a. Approval of the ALP is not to be considered as a determination of necessity or as a commitment of Federal funding for accomplishment of the project development. Inclusion of the proposed development signifies a concurrence for planning purposes based on review of conformance with current standards for safety, utility, and efficiency. Actual facility development will be governed by adherence to development standards applicable at the time the development is undertaken.

b. A Final Environmental Impact Statement (FEIS) was approved May 31, 1984. Mitigation and other conditions established in the FEIS, the ALP approval letter, and other related Federal documents, shall be carried out when the development plan is implemented.

c. Airport Improvement Program (AIP) requirements stipulate that all development programs be reasonably consistent with the plans of planning agencies for the development of the area in which the airport is located that fair consideration has been given to the interest of communities in or near the airport, and that development programs provide for the protection and enhancement of the quality of the environment. The FEIS assessed the environmental impacts with the consideration that the AIP eligible projects may be Federally funded.

d. Reviews of the development proposed on the plan were conducted in accordance with Parts 77, 152 and 157 of the Federal Aviation Regulations. Based on considerations of safe and efficient use of airspace, the FAA offers no objection to the proposed ultimate airspace utilization as depicted on the development plan, subject to compliance with the Airspace Review Comments. The development plan will be afforded the status of a plan on file for the purpose of Federal Aviation Regulation Part 77 Obstruction Evaluations and Part 152 Airport Aid Program.

* * *

After carefully weighing the data and views which have been gathered and evaluated, and those submitted by government officials and members of the public, the Federal Aviation Administration has decided that approval of the Airport Layout Plan is consistent with its mission.

This decision is based in part on the Final Environmental Impact Statement (FEIS) approved May 31, 1984. The Federal Aviation Administration's approval of the Airport Layout Plan will be conditioned on implementing the mitigation measures included in the FEIS and in this Record of Decision.

APPROVED:

/s/ JOHN GUIDOTTI

*Supervisor, Illinois Section*
Chicago Airports District Office

DATE: 11/14/84

## CHICAGO O'HARE INTERNATIONAL AIRPORT
## AIRPORT LAYOUT PLAN DATED MARCH 1984
## AIRSPACE REVIEW COMMENTS

1. Insufficient design information is shown to review the future International Terminal and associated aprons and taxiways. That area, which should fully conform to FAA design standards, must be reviewed by the FAA for acceptability of the concept prior to preparation of preliminary construction plans.

2. Airfield operational limitations due to penetrations of operational surfaces by taxiways and hold pads are as follows:

a. No aircraft may occupy Runway 4L hold pad (new penalty box) during landings on Runway 4L or departures on Runway 22R. Note: Locating the outer circular taxiway within the Runway 4L TERPS approach trapezoid as shown, with no limitation on taxi operations, prevents the existing approach minimums of 400′ ceiling and one mile visibility from being improved, even if instrumentation and lighting upgrading were accomplished.

b. No aircraft may occupy Runway 32R southeast hold pad during landings on Runway 32R, departures on Runway 14L, and Category II/III ILS operations on Runway 14L.

c. No aircraft may occupy Lakeshore Drive Taxiway during landings on Runway 32L. This applies for the existing as well as the proposed 32L threshold locations.

3. The proposed Northwest Tollway access road and U. S. Air Force service road shown near the approach end of Runway 22R must be located so that vehicles do not penetrate the 50:1 approach surface or approach light plane. The roads and vehicles should be added to the approach profile and plan views shown on Sheet 6 when the ALP is next revised.

4. The existing service and power poles shown within the approach to Runway 22L ahould be lowered, if necessary, to provide a clear 50:1 approach surface.

5. When Sheet 9, Airport Land Use Plan, is next revised, the military use area within the Building Restriction Line shown on Sheet 2 should be changed to airfield area. Specific FAA approval is required to place any development in the area.

6. As part of the 550′ extension at east end of Runway 27R, the runway safe area must be established as much as possible without relocating Old Mannheim Road, with appropriate obstruction removal, grading, drainage, and frangible fencing along the road. Normally, all of the runway safety area is required to be constructed; however, due to the high costs involved, construction of the outer portion of the safety area will not be required at this time.

7. The United Airlines Ground Control Tower is acceptable on the west concourse building, but it must be submitted for airspace review prior to the location being finalized. This is to ensure that the tower will not shadow a critical movement area, e.g., a crossover or connector taxiway.

8. A 131′ separation is shown between parked aircraft and the centerline of the inner circular taxiway. This is appropriate for aircraft in Design Groups I through IV. We concur with limiting use of the inner circular taxiway to Design Group IV, which includes the DC-10 and L-1011. Use of the inner taxiway by Design Group V aircraft (B-747) can be accommodated under the terms of the attached Grant of Exemption to FAR Part 139. The standard separation is 153′; however, 131′ is acceptable subject to compliance with the terms of the Grant of Exemption.

9. The following changes should be incorporated in the next revision of the ALP:

a. The future approach light systems for Runways 27R and 32L should be shown as MALSR in lieu of SSALR.

b. The approach light system for Runway 4L should be shown as LDIN in lieu of SALSF.

c. The approach light system for Runway 14R should be shown as existing ALSF-II in lieu of future.

d. The future RIR-A site near the future air cargo area should be shown east of Old Wolf Road in lieu of west of it.

Attachment

**UNITED STATES OF AMERICA**
**DEPARTMENT OF TRANSPORTATION**
**FEDERAL AVIATION ADMINISTRATION**
**GREAT LAKES REGION**
**DES PLAINES, ILLINOIS**

| | |
|---|---|
| **In the matter of the petition of**<br>**CHICAGO-O'HARE INTERNATIONAL AIRPORT, CHICAGO, ILLINOIS**<br>**for an exemption from Section 139.81(a) of the Federal Aviation Regulations** | **Regulatory Docket No. 84-AGL-139.81E-4508** |

## GRANT OF EXEMPTION

By letter dated February 2, 1984, Thomas Kapsalis, Commissioner of the Department of Aviation, City of Chicago (Petitioner), requested an exemption to the requirements of FAR Part 139 to permit B-747 (Design Group V) aircraft to operate on the Inner Circular Taxiway at O'Hare International Airport, with 131′ clearance from said taxiway centerline to airport tenant leasehold lines. Aircraft Design Groups and applicable clearance standards are identified in AC 150/5300-12, Airport Design Standards-Transport Airports. The FAA standard clearance for Design Group V aircraft is 153′ from taxiway centerline to a fixed or movable object.

It has been determined that the specific portion of FAR Part 139 that is applicable in this instance is 139.81(a), which states:

"Each person operating an airport, other than a heliport, for which an airport operating certificate has been issued under Subpart B of this Part shall—(a) Operate, maintain, and provide facilities, equipment, systems, and procedures at least equal in condition, quality, and quantity to the standards currently required for the issue of the airport operating certificate for that airport;".

The Petitioner is currently planning a major expansion of the aircraft operating area surrounding the passenger terminal. In order to establish procedures that would provide FAA standard clearance between operating aircraft and fixed or movable objects, the Petitioner would have to renegotiate a number of long-term leases with airport tenants, to relocate established leasehold lines. This renegotiation would be extremely costly, burdensome, and impractical.

The planned expansion and reconfiguration of the Inner Circular Taxiway will provide acceptable clearances for Design Group I through IV aircraft, which comprise approximately 98 percent of the fleet using the airport. The existing configuration of the Inner Circular Taxiway now provides approximately 135′ clearance from the ends of International Terminals B and C. By agreement, B-747 aircraft (Design Group V) are presently allowed to operate in this area but are prohibited from using other portions of the inner taxiway which have only 112.5′ clearances. The reduction in clearance from 135′ to 131′ and applying such clearance to the entire Inner Circle Taxiway, and permitting operation of Design Group V aircraft on said entire taxiway, is not considered to be of a magnitude whereby safety would be significantly affected, *provided* other measures as specified below are instituted and complied with by the Petitioner. Such measures will provide a level of safety equivalent to that of the standard 153′ clearance. Further, the uniform 131′ clearance will provide a consistent environment for pilots taxiing on the Inner Circular Taxiway and provide greater flexibility for Air Traffic ground control by not restricting Design Group V aircraft to only a portion of said taxiway.

Consequently, upon consideration of all available information, the FAA believes that to require compliance with FAR 139.81(a) in this specific matter is unreasonable and would be contrary to the public interest.

Therefore, pursuant to the authority contained in Sections 601(c), 313(a), and 612 of the Federal Aviation Act of 1958, as amended, FAR Part 11, and delegated to me by the Administrator [(37 FR 12276, 14 CFR 139.19(c)], O'Hare International Airport, Chicago, Illinois, is hereby granted an exempt from the provisions of Section 139.81(a) of the Federal Aviation Regulations as it relates to aircraft operating procedures associated with the Inner Circular Taxiway; *provided* the airport management strictly enforces tenant observance of lease lines and installs and maintains a taxiway centerline lighting system on said Inner Circular Taxiway. Such installation shall be in accordance with current FAA lighting standards. The implementation of this exemption shall be on that date, subsequent to ALP approval by the FAA, when tenant lease lines are physically marked on the pavement, no closer to the Inner Circular Taxiway centerline than 131′ at any point, and when the above-described Inner Circular Taxiway centerline lighting system has been installed, accepted by the FAA, and is operating, whichever event occurs last.

The propriety of this exemption shall be reviewed periodically by the FAA to determine the necessity of its continuance and to assure that its continuance is in the public interest.

This exemption will remain in effect unless and until it is superseded, modified, or rescinded.

PAUL K. BOHR

*Director, Great Lakes Region*

Issued in Des Plaines, Illinois,
on November 14, 1984

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

**STATE OF ILLINOIS, ex rel. WILLIAM J. SCOTT, Attorney General, and PEOPLE OF THE STATE OF ILLINOIS, ex rel WILLIAM J. SCOTT, Attorney General,**

*Plaintiffs,*

*v.*

**ALEXANDER P. BUTTERFIELD, Administrator, Federal Aviation Administration, and JOHN CYROCKI, Director, Great Lakes Region, Federal Aviation Administration, and ROBERT D. TIMM, WHITNEY GILLILLAND, JOSEPH MINETTI, LEE R. WEST and RICHARD J. O'MELIA, Chairman, Vice-Chairman and Members, Civil Aeronautics Board,**

*Defendants.*

**FILED**

**OCT. 14, 1982**

**H. Stuart Cunningham, Clerk**
**United States District Court**

**No. 74 2410**

## CONSENT DECREE

It appearing to the Court that:

1. This action initially was brought by the State of Illinois ("The People") against officials of the Federal Aviation Administration ("FAA") and others to obtain injunctive and declaratory relief from the alleged "... uncontrolled increase in aircraft operations and noise and air pollutant levels at O'Hare International Airport" ("O'Hare"); that the action claimed violations of the National Environmental Policy Act of 1969, 42 U.S.C.

§ 4321, et seq., and the Administrativc Procedure Act, 5 U.S.C. § 533 and the common law nuisance; that thereafter the Village of Niles, City of Park Ridge, Village of Bensenville, Village of Schiller Park, City of Des Plaines, the Village of Mount Prospect and National Organization to Insure a Sound-controlled Environment ("NOISE") were granted leave to intervene.

2. Prior to the entry of this Consent Decree, the following sought and were granted leave to intervene as additional parties plaintiff: Village of Addison, Elk Grove Village, Village of Elmwood Park, Village of Franklin Park, Village of Glenview, Village of Harwood Heights, Village of Norridge, City of Elmhurst, Village of Itasca, Village of Bloomingdale, the County of DuPage and the Suburban O'Hare Commission. (All intervening plaintiffs excepting NOISE are collectively referred to herein as "Communities".)

3. The City of Chicago ("Chicago") was originally a party defendant and was dismissed earlier in the proceeding in this action. Prior to the entry of this Consent Decree, Chicago sought and was granted leave to intervene as an additional party defendant.

4. The parties have agreed to settle, compromise and adjourn their respective differences pertaining to the operation and development of O'Hare as follows:

1. *Environmental Processing of Future Airport Development*

a. All future development at O'Hare will comply with all then applicable requirements of Federal and State of Illinois laws requiring environmental analysis and processing.

b. Plaintiffs agree that the FAA's Finding of No Significant Impact ("FONSI"), dated July 22, 1982, authorizing approval of the

Interim Airport Layout Plan depicting New Terminal 4 and Concourse L, Relocated Flight Kitchens and Airport Maintenance Facilities, Bay Expansions in Terminals 2 and 3, and an Inter-Terminal People Mover System, and incorporated herein by reference, is not unreasonable.

c. Plaintiffs agree that they will not seek in any forum to restrain any person from proceeding with construction of any of the facilities described in Paragraph 1.b. Provided, however, that such withholding of a challenge to the said FONSI does not constitute a waiver of or prejudice to the Plaintiffs' rights to pursue such remedies available to them with respect to future development at O'Hare beyond the scope of the said FONSI.

d. Chicago agrees that it will request the FAA to process an Environmental Impact Statement ("EIS"), and that it will not request a FONSI, with respect to any of the following projects (or projects similar in scale or purpose) at O'Hare: (i) Terminal 1 and related concourses and aprons; (ii) International Terminal; (iii) general aviation terminal; (iv) commuter concourse; (v) new air cargo facilities; (vi) construction of military replacement facilities; (vii) runway extensions. The FAA agrees that an environmental impact statement with respect to these projects will be processed to the extent the above projects fall within its jurisdiction. Chicago further agrees that it will not proceed with the construction of any or all of the projects listed in this Paragraph 1.d until an EIS is completed.

e. The Communities and The People agree that they will not oppose the repeal by the FAA of its High Density Airports Rule ("Slots Rule") (14 C.F.R. § 93.121 et seq.) insofar as it applies to O'Hare.

f. Chicago agrees that the entire Master Plan development for O'Hare, including the projects identified in Paragraph 1.d above, will be presented to the FAA for Airport Layout Plan approval and the related environmental review, as a single, comprehensive submission. Chicago agrees that the environmental assessment which it provides to the FAA and the public in connection with these projects will assess the impact of these projects on the assumption that the High Density Airports Rule will have been repealed.

g. The FAA has not made any determination with respect to the matters described in Paragraphs 1.e or 1.f above, and this Decree does not bind the FAA with regard to any determinations it may make respecting these matters.

2. *Noise Abatement Office*

a. A permanent noise abatement office ("Office") will be established in the Chicago Department of Aviation for O'Hare, at no cost to the Plaintiffs. The Office will be professionally staffed. The supervisor of the Office will be appointed by Chicago, subject to the approval of each such appointment by the O'Hare Advisory Committee ("OHAC").

b. The functions of the Office will be the following unless the Communities and Chicago agree otherwise: (1) receipt, recording and investigation with respect to complaints of noise caused by aircraft using O'Hare, which complaints and reports on action taken, if any, shall be forwarded to OHAC; (2) evaluation of noise abatement procedures and notification of airport users and the public of effectiveness of such procedures; (3) reporting violations of which it is aware of FAA statutes, rules and regulations which affect noise to the O'Hare Advisory Committee; and (4) preparation of reports and recommendations to the O'Hare Advisory Committee with respect to noise abatement.

c. The services of the Office will be available on an around the clock basis, provided however that the Office will have an annual budget of not more than $100,000 (adjusted for changes in prices of goods and services).

3. *O'Hare Advisory Committee*

a. The Parties agree that a permanent forum is required for consideration of the relationship between O'Hare and the Communities.

b. The O'Hare Advisory Committee will be a permanent committee, composed of representatives as follows:

DuPage Mayors and Managers Conference (2)
North Central Council of Mayors (2)
North West Municipal Conference (2)
Suburban O'Hare Commission (1)
Cook County Board of Commissioners (1)
DuPage County Board of Commissioners (1)

Chicago Association of Commerce and Industry (1)
Air Transport Association (1)
Federal Aviation Administration (1)
Northeastern Illinois Planning Commission (1)
Illinois Department of Commerce and Community Affairs (1)
Illinois Department of Transportation (1)
Chicago Department of Aviation (1)
Office of the Mayor, City of Chicago (1)

Members appointed by the DuPage Mayors and Managers Conference, North Central Council of Mayors, North West Municipal Conference and the Suburban O'Hare Commission must all be elected Mayors. Members appointed by the Cook County Board of Commissioners and the DuPage County Board of Commissioners must be elected Commissioners.

4. This Decree will expire on June 30, 1995.

5. Nothing in this Decree indicates, or is intended to indicate, merit or lack of merit in this cause or in any claim or defense that may be available to any party.

6. This Decree may be executed in any number of counterparts, and each counterpart shall be deemed to be an original of the Decree.

IT IS HEREBY ORDERED that the Court accepts the Settlement as set forth above, and reserves jurisdiction to enforce the terms thereof.

IT IS FURTHER ORDERED that, except for the reservation of jurisdiction, this cause be and the same is hereby dismissed with prejudice, with each party to bear its own attorneys fees or costs.

AGREED:

STATE OF ILLINOIS and
THE PEOPLE OF THE
STATE OF ILLINOIS

By TYRONE C. FAHNER
TYRONE C. FAHNER
*Attorney General*
State of Illinois

SUBURBAN O'HARE
COMMISSION

/s/ MARTIN J. BUTLER
MARTIN J. BUTLER

Below is a single page containing the appropriate signatures originally executed and filed as separate pages.

VILLAGE OF NILES

By _____

CITY OF ELMHURST

By _____

CITY OF PARK RIDGE

By _____

VILLAGE OF ITASCA

By _____

VILLAGE OF BENSENVILLE

By _____

VILLAGE OF BLOOMINGDALE

By _____

VILLAGE OF SCHILLER PARK

By _____

COUNTY OF Du PAGE

By _____

CITY OF DES PLAINES

By _____

VILLAGE OF ADDISON

By _____

VILLAGE OF MOUNT PROSPECT

By _____

VILLAGE OF ELMWOOD PARK

By _____

ELK GROVE VILLAGE

By _____

VILLAGE OF GLENVIEW

By _____

VILLAGE OF
FRANKLIN PARK

By _____

VILLAGE OF
NORRIDGE

By _____

VILLAGE OF
HARWOOD HEIGHTS

By _____

National Organization to Insure
a Sound-controlled Environment

By _____

J. Lynn Helms, Administrator,
Federal Aviation Administration,
and Paul Bohr, Director, Great
Lakes Region, Federal Aviation
Administration

By _____

CITY OF CHICAGO

By /s/ JANE M. BYRNE

DATED: _____

ENTER: October 14, 1982

/s/ STANLEY J. ROSZKOWSKI
*JUDGE*

## Administrative Procedure Act

### 5 U.S.C. § 554. Adjudications

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved—

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except a hearing examiner appointed under section 3105 of this title;

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

(b) Persons entitled to notice of an agency hearing shall be timely informed of—

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for—

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not—

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply—

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

the court may order the additional evidence and any counter-evidence the opposite party desires to offer to be taken by the agency. The agency may modify its findings of fact, or make new findings, by reason of the additional evidence so taken, and may modify or set aside its order, and shall file in the court the additional evidence, the modified findings or new findings, and the modified order or the order setting aside the original order.

Added Pub.L. 89-554, § 4(e), Sept. 6, 1966, 80 Stat. 623.

## National Environmental Policy Act of 1969

**42 U.S.C. §§ 4321-4361**

Sec.

4321. Congressional declaration of purpose.

**Subchapter I—Policies and Goals**

4331. Congressional declaration of national environmental policy.

4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts.

4333. Conformity of administrative procedures to national environmental policy.

4334. Other statutory obligations of agencies.

4335. Efforts supplemental to existing authorizations.

**Subchapter II—Council on Environmental Quality**

4341. Reports to Congress; recommendations for legislation.

4342. Establishment; membership; Chairman; appointments.

4343. Employment of personnel, experts and consultants.

4344. Duties and functions.

4345. Consultation with the Citizen's Advisory Committee on Environmental Quality and other representatives.

4346. Tenure and compensation of members.

4347. Authorization of appropriations.

**Subchapter III—Miscellaneous Provisions**

4361. Plan for research, development and demonstration.

**§ 4321. [NEPA § 2]**

**Congressional declaration of purpose**

The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.
Pub.L. 91-190, § 2, Jan. 1, 1970, 83 Stat. 852.

Short Title. Section 1 of Pub.L. 91-190 provided: "That this Act [enacting this chapter] may be cited as the 'National Environmental Policy Act of 1969'."

**Subchapter I—Policies and Goals**

**§ 4331. [NEPA § 101]**

**Congressional declaration of national environmental policy**

(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of

(C) to the agency or a member or members of the body comprising the agency.

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

Pub.L. 89-554, Sept. 6, 1966. 80 Stat. 384.

**5 U.S.C. § 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision**

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the taking of evidence—

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more hearing examiners appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes or proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

(c) Subject to published rules of the agency and within its powers employees presiding at hearings may—

(1) administer oaths and affirmations;

(2) issue subpenas authorized by law;

(3) rule on offers of proof and receive relevant evidence;

(4) take depositions or have depositions taken when the ends of justice would be served;

(5) regulate the course of the hearing;

(6) hold conferences for the settlement or simplication of the issues by consent of the parties;

(7) dispose of procedural requests or similar matters;

(8) make or recommend decisions in accordance with section 557 of this title; and

(9) take other action authorized by agency rule consistent with this subchapter.

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed on rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of section 557(d) of this title sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such

cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 386; Pub.L. 90-904, § 4(c), Sept. 13, 1976, 90 Stat. 1247.

Effective Date of the 1976 Amendment. Section 6(a) of Pub.L. 94-409 provided that: "Except as provided in subsection (b) of this section [relating to subsection (g) of section 552b of this title], the provisions of this Act shall take effect 180 days after the date of its enactment [Sept. 13, 1976]."

**5 U.S.C. §557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record**

(a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title.

(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554(d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific

cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. When the agency makes the decision without having presided at the reception of the evidence, the presiding employee or an employee qualified to preside at hearings pursuant to section 556 of this title shall first recommend a decision, except that in rule making or determining applications for initial licenses—

(1) instead thereof the agency may issue a tentative decision or one of its responsible employees may recommend a decision; or

(2) this procedure may be omitted in a case in which the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires.

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—

(1) proposed findings and conclusions; or

(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and

(3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

(d)(1) In any agency proceeding which is subject to subsection (a) of this section, except to the extent required for the disposition of ex parte matters as authorized by law—

(A) no interested person outside the agency shall make or knowingly cause to be made to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, an ex parte communication relevant to the merits of the proceeding;

(B) no member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, shall make or knowingly cause to be made to any interested person outside the agency an ex parte communication relevant to the merits of the proceeding;

(C) a member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of such proceeding who receives, or who makes or knowingly causes to be made, a communication prohibited by this subsection shall place on the public record of the proceeding:



(i) all such written communications;

(ii) memoranda stating the substance of all such oral communications; and

(iii) all written responses, and memoranda stating the substance of all oral responses, to the materials described in clauses (i) and (ii) of this subparagraph;

(D) upon receipt of a communication knowingly made or knowingly caused to be made by a party in violation of this subsection, the agency, administrative law judge, or other employee presiding at the hearing may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation; and

(E) the prohibitions of this subsection shall apply beginning at such time as the agency may designate, but in no case shall they begin to apply later than the time at which a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of his acquisition of such knowledge.

(2) This subsection does not constitute authority to withhold information from Congress.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 387; Pub.L. 94-409, § 4(a), Sept. 13, 1976, 90 Stat. 1246.

Effective Date of the 1976 Amendment. Section 6(a) of Pub.L. 94-409 provided that: "Except as provided in subsection (b) of this section [relating to subsection (g) of section 552b of this title], the provisions of this Act shall take effect 180 days after the date of its enactment [Sept. 13, 1976]."

**5 U.S.C. § 706. Scope of review**

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393.

## ADMINISTRATIVE ORDERS REVIEW ACT

### 28 U.S.C. SECTION 2347

(a) Unless determined on a motion to dismiss, petitions to review orders reviewable under this chapter are heard in the court of appeals on the record of the pleadings, evidence adduced, and proceedings before the agency, when the agency has held a hearing whether or not required to do so by law.

(b) When the agency has not held a hearing before taking the action of which review is sought by the petition, the court of appeals shall determine whether a hearing is required by law. After that determination, the court shall—

(1) remand the proceedings to the agency to hold a hearing, when a hearing is required by law;

(2) pass on the issues presented, when a hearing is not required by law and it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented; or

(3) transfer the proceedings to a district court for the district in which the petitioner resides or has its principal office for a hearing and determination as if the proceedings were originally initiated in the district court, when a hearing is not required by law and a genuine issue of material fact is presented. The procedure in these cases in the district court is governed by the Federal Rules of Civil Procedure.

(c) If a party to a proceeding to review applies to the court of appeals in which the proceeding is pending for leave to adduce additional evidence and shows to the satisfaction of the court that—

(1) the additional evidence is material; and

(2) there were reasonable grounds for failure to adduce the evidence before the agency;

population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment. Pub.L. 91-190, Title I, § 101, Jan. 1, 1970, 83 Stat. 852.

**Commission on Population Growth and the American Future.** Pub.L., 91-213, Mar. 16, 1970, 84 Stat. 67, provided:

"That the Commission on Population Growth and the American Future is hereby established to conduct and sponsor such studies and research and make such recommendations as may be necessary to provide information and education to all levels of government in the United States, and to our people regarding a broad range of problems associated with population growth and their implications for America's future.

**"Membership of Commission**

"Sec. 2. (a) The Commission on Population Growth and the American Future (hereinafter referred to as the 'Commission') shall be composed of—

"(1) two Members of the Senate who shall be members of different political parties and who shall be appointed by the President of the Senate;

"(2) two Members of the House of Representatives who shall be members of different political parties and who shall be appointed by the Speaker of the House of Representatives; and

"(3) not to exceed twenty members appointed by the President.

"(b) The President shall designate one of the members to serve as Chairman and one to serve as Vice Chairman of the Commission.

"(c) The majority of the members of the Commission shall constitute a quorum, but a lesser number may conduct hearings.

**"Compensation of Members of the Commission**

"Sec. 3. (a) Members of the Commission who are officers or full-time employees of the United States shall serve without compensation in addition to that received for their services as officers or employees of the United States.

"(b) Members of the Commission who are not officers or full-time employees of the United States shall each receive $100 per diem when engaged in the actual performance of duties vested in the Commission.

"(c) All members of the Commission shall be allowed travel expenses, including per diem in lieu of subsistence, as authorized by section 5703 of title 5 of the United States Code [section 5703 of Title 5] for persons in the Government service employed intermittently.

**"Duties of the Commission**

"Sec. 4. The Commission shall conduct an inquiry into the following aspects of population growth in the United States and its foreseeable social consequences:

"(1) the probable course of population growth, internal migration, and related demographic developments between now and the year 2000;

"(2) the resources in the public sector of the economy that will be required to deal with the anticipated growth in population;



"(3) the ways in which population growth may affect the activities of Federal, State, and local government;

"(4) the impact of population growth on environmental pollution and on the depletion of natural resources; and

"(5) the various means appropriate to the ethical values and principles of this society by which our Nation can achieve a population level properly suited for its environmental, natural resources, and other needs.

**"Staff of the Commission**

"Sec. 5. (a) The Commission shall appoint an Executive Director and such other personnel as the Commission deems necessary without regard to the provisions of title 5 of the United States Code [Title 5] governing appointments in the competitive service and shall fix the compensation of such personnel without regard to the provisions of chapter 51 and subtitle II of chapter 53 of such title [sections 5101 et seq. and 5311 et seq. of Title 5] relating to classification and General Schedule pay rates; *Provided*, That no personnel so appointed shall receive compensation in excess of the rate authorized for GS-18 by section 5332 of such title [section 5332 of Title 5].

"(b) The Executive Director, with the approval of the Commission, is authorized to obtain services in accordance with the provisions of section 3109 of Title 5 of the United States Code [section 3109 of Title 5], but at rates for individuals not to exceed the per diem equivalent of the rate authorized for GS-18 by section 5332 of such title [section 5332 of Title 5].

"(c) The Commission is authorized to enter into contracts with public agencies, private firms, institutions, and individuals for the conduct of research and surveys, the preparation of reports, and other activities necessary to the discharge of its duties.

**"Government Agency Cooperation**

"Sec. 6. The Commission is authorized to request from any Federal department or agency any information and assistance it deems necessary to carry out its functions; and each such department or agency is authorized to cooperate with the Commission and, to the extent permitted by law, to furnish such information and assistance to the Commission upon request made by the Chairman or any other member when acting as Chairman.

**"Administrative Services**

"Sec. 7. The General Services Administration shall provide administrative services for the Commission on a reimbursable basis.

**"Reports of Commission: Termination**

"Sec. 8. In order that the President and the Congress may be kept advised of the progress of its work, the Commission shall, from time to time, report to the President and the Congress such significant findings and recommendations as it deems advisable. The Commission shall submit an interim report to the President and the Congress one year after it is established and shall submit its final report two years after the enactment of this Act [Mar. 16, 1970]. The Commission shall cease to exist sixty days after the date of the submission of its final report.

**"Authorization of Appropriations**

"Sec. 9. There are hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, such amounts as may be necessary to carry out the provisions of this Act."

**§ 4332. [NEPA § 102]**

**Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts**

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto

which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.

(E) study, develop, and describe appropriate alternatives to recommended cources of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognizes the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by subchapter II of this chapter.

(5) to conduct investigations, studies, surveys, research, and analyses relating to ecological systems and environmental quality;

(6) to document and define changes in the natural environment, including the plant and animal systems, and to accumulate necessary data and other information for a continuing analysis of these changes or trends and an interpretation of their underlying causes;

(7) to report at least once each year to the President on the state and condition of the environment; and

(8) to make and furnish such studies, reports thereon, and recommendations with respect to matters of policy and legislation as the President may request.

Pub.L. 91-190, Title II, § 204, Jan. 1, 1970, 83 Stat. 855.

**§ 4345. [NEPA § 205]**

**Consultation with the Citizen's Advisory Committee on Environmental Quality and other representatives**

In exercising its powers, functions, and duties under this chapter the Council shall—

(1) consult with the Citizens' Advisory Committee on Environmental Quality established by Executive Order numbered 11472, dated May 29, 1969, and with such representatives of science, industry, agriculture, labor, conservation organizations, State and local governments and other groups, as it deems advisable; and

(2) utilize, to the fullest extent possible, the services, facilities, and information (including statistical information) of public and private agencies and organizations, and individuals, in order that duplication of effort and expense may be avoided, thus assuring that the Council's activities will not unnecessarily overlap or conflict with similar

activities authorized by law and performed by established agencies.

Pub.L. 91-190, Title II, § 205, Jan. 1, 1970, 83 Stat. 855.

**§ 4346. [NEPA § 206]**

**Tenure and compensation of members**

Members of the Council shall serve full time and the Chairman of the Council shall be compensated at the rate provided for Level II of the Executive Schedule Pay Rates. The other members of the Council shall be compensated at the rate provided for Level IV or[1] the Executive Schedule Pay Rates.

Pub.L. 91-190, Title II, § 206, Jan. 1, 1970, 83 Stat. 856.

[1] So in original.

**§ 4346a. [NEPA § 207]**

**Travel reimbursement by private organizations and Federal, State and local governments**

The Council may accept reimbursements from any private nonprofit organization or from any department, agency, or instrumentality of the Federal Government, any State, or local government, for the reasonable travel expenses incurred by an officer or employee of the Council in connection with his attendance at any conference, seminar, or similar meeting conducted for the benefit of the Council.

Pub.L. 91-190, Title II, § 207, as added Pub.L. 94-52, § 3, July 3, 1975, 89 Stat. 258.

**§ 4346b. [NEPA § 208]**

**Expenditures in support of international activities**

The Council may make expenditures in support of its international activities, including expenditures for: (1) international travel; (2) activities in implementation of international

affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Board or Secretary of Transportation. Upon good cause shown and after reasonable notice to the Board or Secretary of Transportation interlocutory relief may be granted by stay of the order or by such mandatory or other relief as may be appropriate.

**(e) Conclusiveness of findings of fact, objections**

The findings of facts by the Board or Secretary of Transportation, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board or Secretary of Transportation shall be considered by the court unless such objection shall have been urged before the Board or Secretary of Transportation or, if it was not so urged, unless there were reasonable grounds for failure to do so.

**(f) Review by Supreme Court**

The judgment and decree of the court affirming, modifying, or setting aside any such order of the Board or Secretary of Transportation shall be subject only to review by the Supreme Court of the United States upon certification or certiorari as provided in section 1254 of Title 28.

(As amended Pub.L. 89-670, § 6(c)(1), Oct. 15, 1966, 80 Stat. 937.)

# AIRPORT AND AIRWAY IMPROVEMENT ACT OF 1982

## 49 U.S.C. SECTION 2202, SEC. 503. DEFINITIONS

(a) IN GENERAL—As used in this title—

(1) "Airport" means any area of land or water which is used, or intended for use, for the landing and takeoff of aircraft, and any appurtenant areas which are used, or intended for use, for airport buildings or other airport facilities or rights-of-way, together with all airport buildings and facilities located thereon.

(2) "Airport development" means any of the following activities, if undertaken by the sponsor, owner or operator of a public-use airport:

(A) any work involved in constructing, reconstructing, repairing, or improving a public-use airport or portion thereof, including—

(i) the removal, lowering, relocation, and marking and lighting of airport hazards; and

(ii) the preparation of plans and specifications, including field investigations incidental thereto;

(B) any acquisition or installation at or by a public-use airport of—

(i) navigation and other aids (including, but not limited to, precision approach systems) used by aircraft for landing at or taking off from such airport, including any necessary site preparation thereby required;

(ii) safety or security equipment required by the Secretary by rule or regulation for the safety or security of persons and property at such air-

Pub.L. 91-190, Title I, § 102, Jan. 1, 1970, 83 Stat. 853; Pub.L. 94-83, Aug. 9, 1975, 89 Stat. 424.

1975 Amendment. Subpar. (D). Pub.L. 94-83 added subpar. (D). Former subpar. (D) redesignated (E). Subpars. (E) to (I). Pub.L. 94-83 redesignated former subpars. (D) to (H) as (E) to (I).

**§ 4333. [NEPA § 103]**

**Conformity of administrative procedures to national environmental policy**

All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this chapter and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this chapter.

Pub.L. 91-190, Title I, § 103, Jan. 1, 1970, 83 Stat. 854.

**§ 4334. [NEPA § 104]**

**Other statutory obligations of agencies**

Nothing in section 4332 or 4333 of this title shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency.

Pub.L. 91-190, Title I, § 104, Jan. 1, 1970, 83 Stat. 854.

**§ 4335. [NEPA § 105]**

**Efforts supplemental to existing authorizations**

The policies and goals set forth in this chapter are supplementary to those set forth in existing authorizations of Federal agencies.

Pub.L. 91-190, Title I, § 105, Jan. 1, 1970, 83 Stat. 854.

**Subchapter II—Council on Environmental Quality**

**§ 4341. [NEPA § 201]**

**Reports to Congress; recommendations for legislation**

The President shall transmit to the Congress annually beginning July 1, 1970, an Environmental Quality Report (hereinafter referred to as the "report") which shall set forth (1) the status and condition of the major natural, manmade, or altered environmental classes of the Nation, including, but not limited to, the air, the aquatic, including marine, estuarine, and fresh water, and the terrestrial environment, including, but not limited to, the forest, dryland, wetland, range, urban, suburban, and rural environment; (2) current and foreseeable trends in the quality, management and utilization of such environments and the effects of those trends on the social, economic, and other requirements of the Nation; (3) the adequacy of available natural resources for fulfilling human and economic requirements of the Nation in the light of expected population pressures; (4) a review of the programs and activities (including regulatory activities) of the Federal Government, the State and local governments, and nongovernmental entities or individuals, with particular reference to their effect on the environment and on the conservation, development and utilization of natural resources; and (5) a program for remedying the deficiencies of existing programs and activities, together with recommendations for legislation.

Pub.L. 91-190, Title II, § 201, Jan. 1, 1970, 83 Stat. 854.

**§ 4342. [NEPA § 202]**

**Establishment; membership; Chairman; appointments**

There is created in the Executive Office of the President a Council on Environmental Quality (hereinafter referred to as the "Council"). The Council shall be composed of three members who shall be appointed by the President to serve at his pleasure, by and with the advice and consent of the Senate. The President shall designate one of the members of the Council to serve as Chairman. Each member shall be a person who, as a result of his training, experience, and attainments, is exceptionally well qualified to analyze and interpret environmental trends and information of all kinds; to appraise programs and activities of the Federal Government in the light of the policy set forth in subchapter I of this chapter; to be conscious of and responsive to the scientific, economic, social, esthetic, and cultural needs and interests of the Nation; and to formulate and recommend national policies to promote the improvement of the quality of the environment.

Pub.L. 91-190, Title II, § 202, Jan. 1, 1970, 83 Stat. 854.

**§ 4343. [NEPA § 203]**

**Employment of personnel, experts and consultants**

(a) The Council may employ such officers and employees as may be necessary to carry out its functions under this chapter. In addition, the Council may employ and fix the compensation of such experts and consultants as may be necessary for the carrying out of its functions under this chapter. In accordance with section 3109 of Title 5 (but without regard to the last sentence thereof).

(b) Notwithstanding section 665(b) of Title 31, the Council may accept and employ voluntary and uncompensated services in furtherance of the purposes of the Council.

Pub.L. 91-190, Title II, § 202, Jan. 1, 1970, 83 Stat. 854; Pub.L. 94-52, § 2, July 3, 1975, 89 Stat. 258.

1975 Amendment. Pub.L. 94-52 designated existing provisions as subsec. (a) and added subsec. (b).

**§ 4344. [NEPA § 204]**

**Duties and functions**

It shall be the duty and function of the Council—

(1) to assist and advise the President in the preparation of the Environmental Quality Report required by section 4341 of this title;

(2) to gather timely and authoritative information concerning the conditions and trends in the quality of the environment both current and prospective, to analyze and interpret such information for the purpose of determining whether such conditions and trends are interfering, or are likely to interfere, with the achievement of the policy set forth in subchapter I of this chapter, and to compile and submit to the President studies relating to such conditions and trends;

(3) to review and appraise the various programs and activities of the Federal Government in the light of the policy set forth in subchapter I of this chapter for the purpose of determining the extent to which such programs and activities are contributing to the achievement of such policy, and to make recommendations to the President with respect thereto;

(4) to develop and recommend to the President national policies to foster and promote the improvement of environmental quality to meet the conservation, social, economic, health, and other requirements and goals of the Nation;

agreements; and (3) the support of international exchange programs in the United States and in foreign countries.

Pub.L. 91-190, Title II, § 208, as added Pub.L. 94-52, § 3, July 3, 1975, 89 Stat. 258.

**§ 4347. [NEPA § 209]**

**Authorization of appropriations**

There are authorized to be appropriated to carry out the provisions of this chapter not to exceed $300,000 for fiscal year 1970, $700,000 for fiscal year 1971, and $1,000,000 for each fiscal year thereafter.

Pub.L. 91-190, Title II, § 209, formerly 207, Jan. 1, 1970, 83 Stat. 856; as redesignated by Pub.L. 94-52, § 3, July 3, 1975, 89 Stat. 258.

## Subchapter III—Miscellaneous Provisions

**§ 4361.**

**Plan for research, development and demonstration**

The Administrator of the Environmental Protection Agency shall transmit to the Congress, within 6 months after October 11, 1976, a comprehensive 5-year plan for environmental research, development, and demonstration. This plan shall be appropriately revised annually, and such revisions shall be transmitted to the Congress no later than two weeks after the President submits his annual budget to the Congress in such year.

Pub.L. 94-475, § 5, Oct. 11, 1976, 90 Stat. 2071.

Codification. Section was enacted as part of the Environmental Research, Development, and Demonstration Authorization Act of 1976, Pub.L. 94-475, and not of the National Environmental Policy Act, which enacted this chapter.

## FEDERAL AVIATION ACT

### 49 U.S.C. § 1486. Judicial review

**(a) Orders subject to review, petition for review**

Any order, affirmative or negative, issued by the Board or Secretary of Transportation under this chapter, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 1461 of this title, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

**Verse**

(b) A petition under this section shall be filed in the court for the circuit wherein the petitioner resides or has his principal place of business or in the United States Court of Appeals for the District of Columbia.

**(c) Notice to Board or Secretary of Transportation, filing of record**

A copy of the petition shall, upon filing, be forthwith transmitted to the Board or Secretary of Transportation by the clerk of the court, and the Board or Secretary of Transportation shall thereupon file in the court the record, if any, upon which the order complained of was entered, as provided in section 2112 of Title 28.

**(d) Power of court**

Upon transmittal of the petition to the Board or Secretary of Transportation, the court shall have exclusive jurisdiction to,

port, or specifically approved by the Secretary as contributing significantly to the safety or security of persons and property at such airport;

(iii) snow removal equipment;

(iv) aviation-related weather reporting equipment; or

(v) equipment to measure runway surface friction;

(C) any acquisition of land or of any interest therein, or of any easement through or other interest in airspace, including land for future airport development, which is necessary to permit any airport development described in subparagraph (A) or (B) of this paragraph or to remove, mitigate, prevent, or limit the establishment of airport hazards.

(3) "Airport hazard" means any structure or object of natural growth located on or in the vicinity of a public-use airport, or any use of land near such an airport, which obstructs the airspace required for the flight of aircraft in landing or taking off at such airport or is otherwise hazardous to such landing or taking off of aircraft.

(4) "Airport planning" means planning as defined by such regulations as the Secretary shall prescribe, and includes integrated airport system planning.

(5) "Commercial service airport" means a public airport which is determined by the Secretary to enplane annually 2,500 or more passengers and receive schedule passenger service of aircraft.

(6) "Government aircraft" means aircraft owned and operated by the United States.

(7) "Integrated airport system planning" means the initial as well as continuing development for planning

purposes of information and guidance to determine the extent, type, nature, location, and timing of airport development needed in a specific area to establish a viable, balanced, and integrated system of public-use airports. It includes identification of system needs, development of estimates of systemwide development costs, and the conduct of such studies, surveys, and other planning actions, including those related to airport access, as may be necessary to determine the short-, intermediate-, and long-range aeronautical demands required to be met by a particular system of airports. It also includes the establishment by a State of standards, other than standards for safety of approaches, for airport development at public-use airports which are not primary airports.

(8) "Landing area" means that area used or intended to be used for the landing, takeoff, or surface maneuvering of aircraft.

(9) "Passengers enplaned" means domestic, territorial, and international revenue passenger enplanements in the States in scheduled and nonscheduled service of aircraft in intrastate, interstate, and foreign commerce as shall be determined by the Secretary pursuant to such regulations as the Secretary may prescribe.

(10) "Planning agency" means any planning agency designated by the Secretary which is authorized by the laws of the State or States or political subdivisions concerned to engage in areawide planning for the areas in which assistance under this chapter is to be used.

(11) "Primary airport" means a commercial service airport which is determined by the Secretary to have .01 percent or more of the total number of passengers enplaned annually at all commercial service airports.

(12) "Project" means a project (or separate projects submitted together) for the accomplishment of airport

development or airport planning, including the combined submission of all projects which are to be undertaken at an airport in a fiscal year.

(13) "Project costs" means any costs involved in accomplishing a project.

(14) "Project grant" means a grant of funds by the Secretary to a sponsor for the accomplishment of one or more projects.

(15) "Public agency" means a State or any agency of a State, a municipality or other political subdivision of a State, a tax-supported organization, or an Indian tribe or pueblo.

(16) "Public airport" means any airport which is used or to be used for public purposes, under control of a public agency, the landing area of which is publicly owned.

(17) "Public-use airport" means—

(A) any public airport,

(B) any privately owned reliever airport, and

(C) any privately owned airport which is determined by the Secretary to enplane annually 2,500 or more passengers and receive scheduled passenger service of aircraft,

which is used or to be used for public purposes.

(18) "Reliever airport" means an airport designated by the Secretary as having the function of relieving congestion at a commercial service airport and providing more general aviation access to the overall community.

(19) "Reliever heliport" means a heliport designated by the Secretary as having the function of relieving congestion at a commercial service airport, by means of

diverting potential fixed-wing enplaned passengers to helicopter carriers.

(20) "Secretary" means the Secretary of Transportation.

(21) "Sponsor" means (A) any public agency which, either individually or jointly with one or more other public agencies, submits to the Secretary, in accordance with this title, an application for financial assistance, and (B) any private owner of a public-use airport who submits to the Secretary, in accordance with this chapter, an application for financial assistance for such airport.

(22) "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, the Government of the Northern Mariana Islands, the Trust Territory of the Pacific Islands, and Guam.

(23) "Trust Fund" means the Airport and Airway Trust Fund established by section 9502 of Title 26.

(24) "United States share" means that portion of the project costs of project for airport development or airport planning approved pursuant to section 2208 of this title which is to be paid from funds made available for the purposes of this chapter.

(b) Amounts made available

Whenever in this chapter reference is made to the amount made available for fiscal year under section 2204 of this title, such reference shall mean the amount made available for obligation under subsection (a) of section 2204 of this title for that fiscal year as reduced or limited by any Act of Congress enacted after September 3, 1982.

## 49 U.S.C. SECTION 2208, SEC. 509. SUBMISSION AND APPROVAL OF PROJECT GRANT APPLICATIONS

**(a) Submission**

(1) Subject to the provisions of this subsection, (A) any public agency, or two or more public agencies acting jointly, or (B) any sponsor of a public-use airport, or two or more such sponsors acting jointly, may submit to the Secretary a project grant application for one or more projects, in a form and containing such information as the Secretary may prescribe, setting forth the project proposed to be undertaken. No project grant application shall propose airport development or airport planning except in connection with public-use airports included in the current national plan of integrated airport systems prepared pursuant to section 2203 of this title. Nothing in this subsection shall authorize the submission of a project grant application by any public agency which is subject to the law of any State if the submission of such application by the public agency is prohibited by the law of that State. All proposed airport development shall be in accordance with standards established or approved by the Secretary, including, but not limited to, standards for site location, airport layout, site preparation, paving, lighting, and safety of approaches.

(2) Notwithstanding any provision of this chapter, the sponsor of any airport may submit a project-grant application for airport development (including noise compatibility projects) to the Secretary within 180 days after September 3, 1982, and the Secretary may incur obligations to fund such projects, in accordance with the provisions of this chapter, from funds available for obligation pursuant to section 2206(a) of this title, if—

> (A) a project-grant application or preapplication for such project was submitted to the Secretary before September 30, 1980; or

(B) the project was carried out after September 30, 1980, and before September 3, 1982.

**(b) Approval**

(1) No project grant application may be approved by the Secretary unless the Secretary is satisfied that—

(A) the project is reasonably consistent with plans (existing at the time of approval of the project) of public agencies authorized by the State in which such airport is located to plan for the development of the area surrounding the airport and will contribute to the accomplishment of the purposes of this chapter;

(B) sufficient funds are available for that portion of the project costs which are not to be paid by the United States under this chapter;

(C) the project will be completed without undue delay;

(D) the sponsor which submitted the project grant application has legal authority to engage in the project as proposed; and

(E) all project sponsorship requirements prescribed by or under the authority of this chapter have been or will be met.

(2) No project grant application for airport development may be approved by the Secretary unless the sponsor, a public agency, or the United States or an agency thereof holds good title, satisfactory to the Secretary, to the landing area of the airport or site therefor, or gives assurance satisfactory to the Secretary that good title will be acquired.

(3) No project grant application for airport development may be approved by the Secretary which does not include provision for (A) land required for the installation of approach light systems; (B) touchdown zone and centerline runway

lighting; or (C) high intensity runway lighting, when it is determined by the Secretary that any such item is required for the safe and efficient use of the airport by aircraft, taking into account the type and volume of traffic utilizing the airport.

(4) No project grant application for airport development may be approved unless the Secretary is satisfied that fair consideration has been given to the interest of communities in or near which the project may be located.

(5) It is declared to be national policy that airport development projects authorized pursuant to this chapter shall provide for the protection and enhancement of the natural resources and the quality of the environment of the Nation. In implementing this policy, the Secretary shall consult with the Secretary of the Interior and the Administrator of the Environmental Protection Agency with regard to any project included in a project grant application involving airport location, a major runway extension, or runway location which may have a significant impact on natural resources including, but not limited to, fish and wildlife, natural, scenic, and recreation assets, water and air quality, and other factors affecting the environment, and shall authorize no such project found to have significant adverse effect unless the Secretary shall render a finding, in writing, following a full and complete review, which shall be a matter of public record, that no feasible and prudent alternative exists and that all reasonable steps have been taken to minimize such adverse effect.

(6)(A) No project grant application for airport development involving the location of an airport, an airport runway, or a major runway extension may be approved by the Secretary unless the sponsor of the project certifies to the Secretary that there has been afforded the opportunity for public hearings for the purpose of considering the economic, social, and environmental effects of the airport or runway location and its consistency with the goals and objectives of such planning as has been carried out by the community.

(B) When hearings are held under subparagraph (A) of this paragraph, the project sponsor shall, when requested by the Secretary, submit a copy of the transcript to the Secretary.

(7)(A) No project grant application for a project involving airport location, a major runway extension, or runway location may be approved unless the Governor of the State in which such project is to be located certifies in writing to the Secretary that there is reasonable assurance that the project will be located, designed, constructed, and operated so as to comply with applicable air and water quality standards. In any case where such standards have not been approved and where applicable air and water quality standards have been promulgated by the Administrator of the Environmental Protection Agency, certification shall be obtained from such Administrator. Notice of certification or refusal to certify shall be provided within sixty days after the project application has been received by the Secretary.

(B) The Secretary shall condition approval of any such project grant application on compliance during construction and operation with applicable air and water quality standards.

(8) Notwithstanding any other provision of law, the Secretary may approve an application for an airport development project (other than an airport development project to which paragraph (7)(A) applies) at an existing airport without requiring the preparation of an environmental impact statement with respect to noise for such project if—

(A) completion of the project would allow existing aircraft operations at the airport that involve aircraft that do not comply with the noise standards prescribed for "stage 2" aircraft in section 36.1 of title 14, Code of Federal Regulations, to be replaced by aircraft operations involving aircraft that do comply with such standards; and

(B) the project complies with all other statutory and administrative requirements imposed under this chapter.

(9) In establishing priorities for the distribution of funds available pursuant to section 2206 of this title, the Secretary may give priority to approval of projects that are consistent with integrated airport system plans.

**(c) State standards**

The Secretary is authorized to approve standards, other than standards for safety of approaches, established by a State for airport development at public-use airports in such State which are not primary airports, and, upon such approval, such State standards shall be the standards applicable to such airports in lieu of any comparable standard established under subsection (a) of this section. State standards approved under this subsection may be revised from time to time, as the State or the Secretary determines necessary, subject to approval of such revisions by the Secretary.

**(d) Acceptance of certification**

The Secretary is authorized in connection with any project to require a certification from a sponsor that such sponsor will comply with all of the statutory and administrative requirements imposed on such sponsor under this chapter in connection with such project. Acceptance by the Secretary of a certification from a sponsor may be rescinded by the Secretary at any time. Nothing in this subsection shall affect or discharge any responsibility or obligation of the Secretary under any other Federal law, including, but not limited to, the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), section 303 of this title, title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000b) [42 U.S.C. 2000d et seq.], title VIII of the Act of April 11, 1968 (42 U.S.C. 3601 et seq.), and the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (42 U.S.C. 4601 et seq.).

**(e) Requirement of notice**

Each sponsor to which funds are apportioned under section 2206(a)(1) of this title shall notify the Secretary, by such time and in a form containing such information as the Secretary may prescribe, of the fiscal year in which it intends to apply, by project grant application, for such funds. If a sponsor does not provide such notification, the Secretary may defer approval of any application for such funds until the fiscal year immediately following the fiscal year in which such application is submitted.

## AFFIDAVIT OF ROBERT H. HAVEMAN

I, ROBERT H. HAVEMAN, having been duly sworn on oath, depose and state that:

1. My name is Robert H. Haveman, and I reside at 6302 Landfall Drive, Madison, Wisconsin.

2. I am presently the John Bascom Professor of Economics at the University of Wisconsin, Madison, Wisconsin.

3. Prior to assuming my present position, I served as:

a. Senior Economist, Subcommittee on Economy in Government, Joint Economic Committee of the United States Congress;

b. Research Professor at the Brookings Institution, Washington, D.C.; and

c. Research Associate, Resources for the Future, Inc., Washington, D.C.

4. Within the field of economics, I specialize in public finance and the application of economic criteria to large-scale public investments, such as navigation projects, flood control projects, hydro-electric generating facilities, and airport facilities.

5. I have extensive experience in evaluating proposed expansion or construction of large-scale, public works facilities which are designed to address asserted economic needs. This expeience includes evaluation and analysis of reports presenting estimates of transportation demand, the effects of transportation facility capacity constraints on congestion (delay) and the costs associated with delays. Also included in my experience is evaluation of the validity of asserted economic impacts of proposed public works projects, and the environmental damages which the projects will cause. Finally, I have extensive experience in the identification and evaluation

of structural and non-structural alternatives to proposed public works projects. Such alternatives are designed to serve asserted economic needs with minimum environmental harm.

6. I have been asked by the Suburban O'Hare Commission to examine and evaluate the *Final Environmental Impact Statement, Chicago, O'Hare International Airport* (May 1984) (hereinafter FEIS) prepared by the Federal Aviation Administration (FAA).

7. The City of Chicago has proposed a major expansion of O'Hare Field for the announced purpose of meeting the future long-term aviation demand for the Chicago metropolitan area. This expansion proposal results from a "Master Plan" prepared by the City under FAA sponsorship to identify the facilities necessary to accommodate long-term aviation demand. The end product of the Master Plan is the preparation of an "Airport Layout Plan" (ALP) which describes the facilities identified as necessary to meet the demand. FAA must approve the Airport Layout Plan before construction can begin.

8. I have organized my affidavit in the following manner:

I. A discussion of the basic economic decisionmaking principles used by the FAA and transportation economists and planners in identifying the need to be addressed, the identification of alternatives to meet that need, and the selection of one of the identified alternatives to meet the need;

II. A summary of decisionmaking steps taken by Chicago which culminated in the expansion proposal; and

III. My analysis and findings regarding the proposed Chicago O'Hare expansion. This analysis is in turn organized into the following topics:

A. Identification of Chicago's Objective: meeting the 20-year long-term aircraft operations demand for the Chicago metropolitan area. A critical secondary goal is to

meet this 20-year aircraft operations demand without subjecting travelers to unacceptable delay. The critical factors used by Chicago and the FAA which affect the estimates of the need for capacity, identification of alternatives and environmental impacts are: 1) the 20-year long-term metropolitan aircraft operations demand; and, 2) the capacity of O'Hare Field to accommodate that demand. The FEIS fails to disclose or substantiate the current 20-year long-term operations demand for the Chicago metropolitan area and fails to analyze the capacity of O'Hare Field to accommodate that demand.

B. Identification of alternative means of achieving the proponent's objective of accommodating the 20-year aircraft operations demand. Chicago concluded that the capacity of the existing O'Hare Field is insufficient to meet the 20-year aircraft operations demand. To meet the 20-year demand Chicago identified the following alternatives: 1) two new runways at O'Hare; 2) use of other existing airports in other cities; and, 3) construction of a new air carrier airport. According to Chicago's Master Plan analysis, one of these alternatives *must* be implemented to meet the 20-year operations demand. Yet, the FEIS fails to analyze the environmental impacts of two new runways at O'Hare; ignores the use of existing airports in other cities; and rejects construction of a new air carrier airport without any substantiation. Further, the FEIS either ignores or rejects without substantiation other alternatives, including the use of other transportation modes and non-structural mechanisms for reducing demand.

C. Benefit/Cost Decisionmaking in Selecting the Project: an analysis of the errors in the benefit/cost justification used by Chicago and accepted by the FAA as the basis for the proposed expansion. Chicago and the FAA state that Chicago selected the proposed expansion

from several alternatives based on a benefit/cost analysis. Yet, the FEIS fails to disclose or analyze the benefits or the costs, and Chicago has committed serious errors in the benefit/cost analysis. Among these errors is the failure to include the costs of noise to surrounding property owners and the cost of delay to air travelers resulting from the expanded operations—costs used by the FAA in evaluating other airport projects.

D. Disclosure of Data and Methodology: a discussion of the failure of the FEIS to disclose the data, calculations and methodology supporting the claims made by Chicago and the FAA. Key missing material is the *current* 20-year metropolitan aircraft operations demand forecast and the FAA and Chicago's current calculations of the "practical" and physical capacity of the O'Hare airfield. This missing material drives the entire assessment of project need, project alternatives and project environmental impacts.

## I.

## BASIC ECONOMIC PRINCIPLES FOR EVALUATING PUBLIC INVESTMENTS

9. In proposing and approving an expansion of O'Hare facilities to meet the forecast increase in aircraft operations demand, Chicago and the FAA purported to follow basic economic common sense principles. There are several basic economic principles that must be followed in any sound evaluation of a proposed public sector investment. These standards are universally recognized by government and private economists. I used these standards while serving as Senior Economist on the Staff of the Joint Economic Committee of the United States Congress, and these standards are used by the FAA in making federal investment decisions. See *Economic Analysis of Investment and Regulatory Decisions—A Guide*, United States Department of Transportation, Federal Aviation Administration (1982).

10. Under these generally accepted standards, the following steps should be followed in identifying and evaluating alternative proposed public investments:

a. The objectives which are to be achieved by the proposed investment should be clearly identified and fully described.

b. The alternative investments and other procedures available for meeting the objectives should be identified and described. A "no action" alternative should be included in the list.

c. The economic benefits and economic costs of each alternative should be estimated and the values clearly displayed. Moreover, the underlying assumptions, data, and procedures employed in the estimation should be clearly stated and shown as part of the analysis.

d. Only alternatives which have economic benefits in excess of economic costs should be considered, and the alternative which has the greatest net benefits should be selected.

*See generally, Economic Analysis of Investment and Regulatory Decisions—A Guide*, p. 2-4 (FAA 1982).

11. As a basic corollary to these standards of economic analysis, there must be full disclosure of the following components of the analysis so that independent economists, the public, and the courts can evaluate the accuracy of the analysis and the merits of the proposed project. Without disclosure of the following components, there is no way to test the honesty and accuracy of the economic claims for benefits and costs associated with the various alternatives. Since the economic claims made for a proposal automatically shape the design and physical sizing of the porposal and, consequently, determine the

physical environmental impacts of the proposal, disclosure of these components is essential to sound economic and environmental decision-making. The key components to be disclosed are:

a. The raw data used to support the proponent's assertions regarding the basic need for the proposal, the benefits and costs of various alternatives, and the environmental impacts of various alternatives;

b. The analytical methodology applied to the raw data—e.g., a formula, calculation process, or mathematical model. For example, if an independent evaluator were to examine an accountant's conclusions regarding the amount of depreciation claimed for an asset, it would be critically important for the evaluator to know if the accountant were using, say, straight line or double declining balance methods. The need for full disclosure of the analytical methodology—whether the methodology is a standard technique or is specially designed by the proponent of the project—is essential.

c. The actual calculation worksheets, where the proponent of a project actually applies the general analytical methodology to the specific raw data on the project.

12. Only if these three elements are disclosed and available, can the public, the reviewing courts, and independent experts make an objective evaluation of the accuracy of the factual claims regarding economic and environmental effects made by the proponent of a public works project.

## II.

## A SUMMARY OF CHICAGO'S DECISIONMAKING PROCESS CULMINATING IN THE EXPANSION PROPOSAL

13. Chicago's Master Plan purported to follow the above described steps in selecting the proposed expansion option for O'Hare airport. Chicago appears to have followed the explicit steps laid out in two FAA publications entitled:

A. *Planning The Metropolitan Airport System,* FAA and Airport Operators Council International AC 150/5070-5 (1970).

B. *Airport Master Plans* AC 150/5070-6 (FAA 1971).

14. Chicago's decisionmaking steps under the Master Planning process were:

*Step 1. The 20-Year Aircraft Operations Demand Forecast.* Chicago calculated the long-term aircraft operations demand for Chicago's air carrier airports. FAA requires a forecast of annual operations over a 20-year period. The 20-year forecast operations demand was 1,412,000 operations in year twenty.

*Step 2. The Split of the 20-Year Operations Forecast Between O'Hare and Midway.* Chicago then split the long-term 1,412,000 Chicago area aircraft operations demand between O'Hare and Midway based on four different assumptions on the long-term use of Midway. Under each of these assumptions about the use of Midway, O'Hare was allocated over 1,000,000 operations annually.

*Step 3. Capacity/Delay Analysis.* Chicago then performed a capacity analysis on O'Hare to see if the existing airfield could accommodate the forecast aircraft operations. Chicago found that the capacity of the existing O'Hare Field would not neet projected aircraft operations demand, and that delays to aircraft that could be serviced would be very severe.

*Step 4. Identification of Alternatives to Meet the 20-Year Forecast Operations Demand.* Where the existing airfield does not have the capacity to accept the forecast demand, the FAA requires the identification of various combinations of alternatives to meet the forecast demand. Chicago identified the following alternatives:

a. Two new runways at O'Hare;

b. A cap on operations at O'Hare with use of other airports in other cities and limited use of Midway;

c. A new air carrier airport for the Chicago area.

Chicago apparently considers the use of other airports in other cities a short-term option, and stated that either two new runways or a new air carrier airport for Chicago would be needed to accommodate forecast demand.

*Step 5. Benefit/Cost Analysis.* Chicago then did a benefit/cost analysis on the two alternatives of: a) two new runways at O'Hare; and, b) capped operations at O'Hare with some use of Midway and the use of other city airports. Despite the fact that Chicago apparently considered use of other airports to be a short-term option and acknowledged that a new airport would be needed, Chicago did no feasibility or benefit-/cost analysis of a new airport.

*Step 6. Chicago's Selection.* Based on this benefit/cost analysis Chicago selected an expansion alternative which called for a cap on O'Hare operations with use of Midway and other city airports to accommodate interconnect traffic. Again, despite the fact that Chicago apparently considered use of other city airports to be a short-term alternative and acknowledged that a new air carrier airport would be needed—if two new runways were not built at O'Hare—there was no investigation or analysis of a new air carrier airport.

15. The project selected by Chicago—cap on operations at O'Hare with use of other airports in other cities—was then subjected to a Draft Environmental Impact Statement, (D-EIS) prepared by Chicago (Volume XVI of the Master Plan). The FAA then purported to prepare an FEIS based on the Master Plan decisionmaking process and the project selected in the Master Plan.

## III.

## ANALYSIS AND FINDINGS

16. I have examined the Chicago proposal for expansion of operations at O'Hare according to the principles of economic analysis described above and used by FAA in evaluating proposals for federal investments. I have particularly examined the FEIS to determine if it meets these requirements. My conclusions are as follows.

### A.

### IDENTIFICATION AND DESCRIPTION OF PROPONENTS' OBJECTIVES

17. The FEIS fails to clearly disclose the nature and scope of Chicago's objectives in the expansion of O'Hare. The decisionmaking steps described above are barely mentioned, let alone analyzed in the FEIS. Nowhere is the reader told of the 20-year metropolitan aircraft operations demand. Nowhere is the reader told any detail of the capacity/delay analysis to see if O'Hare can accommodate the demand. Nowhere is there any discussion of the practical capacity or the physical capacity of O'Hare. Yet these are the key calculations that determine the need for any expansion, the identification of alternatives and the environmental impacts of the alternatives.

18. However, examination of a series of documents produced by the City of Chicago under varying titles which are generically denoted "Chicago O'Hare International Master Plan Study" (Master Plan) clearly establishes that Chicago's primary objective is to meet the future air traffic demand projected for the Chicago area air carrier airports. According to Chicago, the purpose of the Master Plan effort was to:

> ...define and quantify the development of air carrier airport facilities to meet the *long-range future needs of the Chicago Metropolitan Area.* ...[T]his effort, *a master plan for O'Hare and Midway,* focused on the management of the existing facilities to meet the future needs.
>
> Master Plan, Volume XI, p. I-1 (emphasis added).

19. The "future needs" were defined as the forecast demands for air travel using Chicago air carrier airports for a 20-year period. (THE FAA manuals for master plan preparation require calculations of demand for a 20-year period).

20. These "future needs" were estimated in the Master Plan as follows. First, Chicago calculated the demand for aggregate air traffic for the entire Chicago area, not for any specific allocation to a particular air carrier airport.

> Forecasts of the demand for air transportation are necessary to support the determination of required facilities at Chicago O'Hare International Airport and Midway Airport. These projections were developed for the *total Chicago area,* and in subsequent tasks, *will be allocated between the two facilities* in accordance with the role selected for each of the airports.
>
> Master Plan, Volume III, p. 6 (emphasis added).

21. This forecast metropolitan demand was published by Chicago for a 20-year period:

**"SUMMARY OF AIRCRAFT OPERATIONS FORECASTS FOR O'HARE INTERNATIONAL AIRPORT AND MIDWAY AIRPORT"**

| 1974 | 1980 | 1985 | 1990 | 1995 |
|---|---|---|---|---|
| 853.8 | 943.0 | 1,064.5 | 1,234.5 | 1,412.0 |

[thousands of operations, i.e., takeoffs or landings]

Source: Master Plan Volume III, Table 6, p. 23.

22. Accommodating this forecast 20-year aircraft operations demand then is the primary objective of the Chicago Master Plan and the project expansion proposed for O'Hare.

23. Chicago, in its Master Plan, split the total 1.4 million annual forecast operations traffic between O'Hare and Midway under four different options—each of which allocated over a million of the annual operations to O'Hare and used Midway in a variety of ancillary roles. These alternative traffic splits were:

A. *Alternative Traffic Split 0* assumed that the traditional traffic split between Midway and O'Hare would continue. That traffic split allocated 1,140,300 operations to O'Hare.

B. *Alternative Traffic Split 1* was to close Midway and let O'Hare carry all the air carrier traffic. Under this alternative the traffic split of the hub demand allocated 1,207,200 operations to O'Hare.

C. *Alternative Traffic Split 2* was to keep Midway open without expanding its runways and to accommodate a small amount of air carrier traffic at Midway. This alternative allocated 1,134,800 operations of the hub demand to O'Hare.

D. *Alternative Traffic Split 3* was to expand Midway's runways to accommodate longer range aircraft operations, i.e., heavier fuel load. Under this alternative, 1,087,900 operations would be allocated to O'Hare.

Source: Master Plan, Volume VII, pp. IV-4, I-6, and I-7.

24. Chicago then conducted a capacity analysis to see if the existing O'Hare airfield (e.g., runways and taxiways), could accommodate the forecast traffic volume. This so-called "do nothing" analysis (contained at Chapter 3 of Volume VII of the Master Plan) assumed that the existing traffic split between O'Hare and Midway would continue to apply to the future 20-year demand forecast. Chicago calculated the ability of O'Hare to accommodate this forecast traffic and assumed that the future desired advances in air traffic control technology were in place.

25. Chicago's conclusions as to the existing O'Hare operation under the "do-nothing option" are noteworthy and apply to the current situation. Chicago found that as the forecast aircraft operations levels approached the theoretical physical capacity of the airfield, the total delay time caused by traffic congestion became enormous. Even for traffic that could be accommodated on the field, the delays would be so great as to be intolerable.

> As can be seen in the exhibit, the pattern of delay appears to be exponential, and undergoes a very rapid change in the rate of increase of delay between 1985 and 1995. The proper conclusion to be reached from the exhibit is that the system would begin to deteriorate very rapidly between 1985 and 1995; and that delay and congestion conditions would become increasingly intolerable after 1985.
>
> Master Plan, Volume VII, p. III-17.

26. Thus, even if the airfield had the physical capacity to accept the aircraft, the rapidly increasing delays per aircraft would cause major problems even with multi-million dollar investments in new air traffic control technology. This phenomenon of exponentially increasing delay, as traffic levels approach the physical throughput capability of the airfield, is a well-known phenomenon in transportation system analysis.

27. Chicago acknowledged that these huge delays would force either: a) a cap on operations to a level where the cost of the delay was tolerable; or, b) the construction of new facilities.

> At some point during that time frame [that is after 1985], it would become necessary to either *curtail traffic* or to begin to rely heavily on the *addition of new facilities.*
>
> Master Plan, Volume VII, p. III-17 (emphasis added).

28. Chicago then identified the facilities needed to address the projected post-1985 aircraft operations demand—namely, two new runways.

> From the analysis described in this chapter, it was concluded that *additional runways will be necessary at O'Hare between 1985 and 1995 if the full potential demand is to be serviced.*
>
> Master Plan, Volume VII, p. III-18 (emphasis in original).

29. Thus, in addition to the need to accommodate the 20-year aircraft operations forecast demand—which is the primary goal of the decisionmaking process—a secondary purpose was to accommodate this demand with acceptable levels of delay.

## B.

## IDENTIFICATION AND EVALUATION OF ALTERNATIVE MEANS OF ACHIEVING OBJECTIVES

30. Having concluded that the 20-year aircraft operations demand exceeded the capacity of the existing O'Hare Field, the City of Chicago proceeded to identify alternatives which would meet the long-term aircraft operations demand without intolerable delay. As set forth below, the only three alternatives identified by Chicago to meet these objectives are:

a. two new runways at O'Hare;

b. A cap on operations at O'Hare with the use of other airports in other cities; and

c. a new air carrier airport for Chicago.

31. It is important to note that given the 20-year demand projections described above, Chicago has stated that one of these three alternatives is inevitable. Thus if a new airport or the use of other airports in other cities are rejected as alternatives (the FEIS either rejects or ignores both of these alternatives), Chicago has stated categorically that two new runways at O'Hare will be necessary to accommodate forecast demand. Conversely, if no new runways are constructed at O'Hare, the forecast demand must, according to Chicago, be accommodated by either use of other airports in other cities or construction of a new airport.

32. The FEIS virtually ignores these three alternatives identified by Chicago to meet the long-term 20-year aircraft operations demand. The entire FEIS analysis of alternatives to meet the economic objectives of the City of Chicago, i.e., meeting projected air traffic demand without increasing delay and congestion to unacceptable levels, consists of five pages, pp. 20-24 of the FEIS.

## (1) TWO NEW RUNWAYS

33. The alternatives actually considered by Chicago are contained in Volume XI of the Master Plan, entitled *Alternatives.* As noted above, alternative traffic splits 0-3 contemplated various uses of Midway with the vast bulk of the demand being handled by O'Hare under any of the traffic splits. Under alternative splits 0-3 all the traffic not handled by Midway would be accommodated by O'Hare.

34. Under the Master Plan, the alternative necessary to accommodate all the O'Hare traffic under traffic splits 0-3 was two new runways. Thus, to accomplish the objective of meeting 20-year operations demand at the *existing* Chicago airports, Chicago explicitly and repeatedly stated that two new runways would be necessary at O'Hare:

> From the analysis described in this chapter, it was concluded that *additional runways will be neccessary at O'Hare between 1985 and 1995 if the full potential demand is to be serviced.*
>
> Master Plan, Volume VII, p. III-18 (emphasis in original).

> Unconstrained development [two new runways] of O'Hare will be necessary to accommodate forecast unconstrained Chicago area aviation demand (Alternatives 0, 1 and 2) and provide *existing* airport system growth beyond the year 2000.
>
> Master Plan, Volume XI, p. V-1 (emphasis added).

35. As can be seen from the quotations cited, Chicago used two new runways as the alternative to meet the forecast traffic demand at the existing Chicago facilities. Thus without construction of a new airport (which the FEIS rejects) or use of other airports (which the FEIS rejects), the only alternative identified by Chicago to meet the forecast 20-year demand is

construction of two new runways at O'Hare. The FEIS ignores this alternative.

36. The only mention by the FAA of the two new runway alternative is in a single sentence on pp. 24-25 of the FEIS. It is not acknowledged that alternative traffic splits 0-3 listed on p. 24 imply the construction and use of two new runways. No mention is made that Chicago has unequivocally stated that unless other existing airports are used or a new air carrier airport is built, two new runways are inevitable.

37. For the FAA to disregard the economic and environmental impacts of this alternative is irrational and irresponsible. The FEIS rejects or ignores as not feasible the only other two alternatives identified by Chicago to meet long-term aircraft operations demand—use of existing airports and a new airport. By rejecting and not implementing either of these options, the FAA has made it inevitable that two new runways will be the alternative implemented.

38. Moreover, contrary to the FAA's statement on p. 25 of the FEIS that Chicago has decided to limit the growth of future aviation activity at O'Hare to that which can be accommodated on existing runways, I have found no evidence of a disavowal by Chicago against the future construction of new runways at O'Hare. Without use of existing airports or the construction of a new air carrier airport, Chicago has unequivocally stated that O'Hare will need two new runways to accommodate the projected air traffic. Thus, a decision to let traffic expand at O'Hare without the use of other existing airports or the construction of a new airport is by default a decision to construct new runways.

## (2) CAP ON OPERATIONS WITH USE OF OTHER AIRPORTS

39. As discussed above, of the six traffic split options discussed, the first four (listed as Alternatives 0, 1, 2, and 3 on p. 24 of the FEIS) would accommodate *all* of the 1.4 million annual operations forecast for 1995 at O'Hare and Midway. This was accomplished by the alternative of two new runways at O'Hare.

40. Chicago also identified an alternative available to accommodate the 1.4 million operations if two new runways were not built at O'Hare and all the forecast traffic could not be handled at O'Hare and Midway.

41. This alternative involved putting a cap on operations at O'Hare. With the cap on operations at O'Hare, various uses of Midway were also considered.

42. With the cap on operations at O'Hare and the full utilization of Midway, the forecast demand still could not be met. Chicago explicitly stated that a portion of the forecast traffic would be allocated to other airports in other cities.

43. Chicago stated the cap on operations alternative at O'Hare as follows:

> . . . [T]he O'Hare demand growth was assumed to be curtailed between 1985 and 1995, eliminating the need for the extensive development of the unconstrained case [i.e., two new runways].
>
> Master Plan, Volume VII, p. IV-9.

44. Chicago established the cap on operations at O'Hare at 950,000 annual operations. However, because the delays shown in the Master Plan at 950,000 operations would be so great, it is virtually certain that a much lower cap on operations would be established.

45. The Master Plan shows the delays that would be experienced at current aircraft separation requirements at 712,182 operations, 862,300 operations and 950,900 operations. (See p. IV-17 of Volume VII.) As shown in the attached graph (Exhibit 1), the delay pattern rises exponentially and aircraft would experience an average delay of 22.9 minutes at 862,300 operations, and 29.1 minutes per operation at 950,900 operations—compared to 4.2 minutes delay per operation at 712,182 operations. This exponential increase in average delay times follows the classic delay pattern cited by the FAA (compare Exhibit 1 with Exhibit 2), and would lead to chaotic conditions at the airport. Using Chicago's own reasoning and analysis, the "system would begin to deteriorate very rapidly" between 712,000 operations and 862,000 operations, and "delay and congestion problems would become increasingly intolerable". At some point prior to reaching these extreme levels of delay, it would be necessary to either cap operations at lower levels and divert the traffic to other airports in other cities or to build new facilities.

46. Interestingly, Chicago has identified—but the Final EIS fails to analyze—the new facilities that would reduce this enormous delay: two new runways.

> Annual delay becomes much less pronounced with the addition of two new runways.
>
> Master Plan, Volume VII, p. IV-19.

47. Whatever cap on operations is selected (i.e., 712,182, 862,300, 950,900) it is self-evident that the forecast demand (1.4 million operations) cannot be accommodated at Chicago's existing air carrier airports (assuming no new runways at O'Hare). Chicago recognized this short-fall and selected an alternative which would meet the forecast demand—use of other existing hub airports.

48 Chicago's "hybrid" or combination alternative to meet the long-term forecast traffic demand was as follows:

a. a cap on operations at O'Hare;

b. using all of Midway's capacity without extending Midway's runways; and

c. use of other airports in other cities.

49. The selection of this alternative is set forth in Volume XI of Chicago's Master Plan at pp. V-6 to V-7. Chicago states:

> On the basis of benefit/cost relationships, coupled with the high level of community concern for airport noise, the attendant social costs and the questionable ability to implement plans requiring new runways, a city policy decision was made to proceed with planning based upon the role identified as Alternative 4 (constrained development with 120-130 domestic gates) utilizing the existing O'Hare runway configuration. . . .[I]t was decided to use Midway to serve part of the scheduled commercial activity, in selected short-haul markets, that *would have to be diverted from O'Hare.* Thus Alternative 2 was selected for Midway [no expansion but use of Midway as air carrier facility for 29% of short haul traffic], effectively postponing the time when new aviation facilities will be needed to serve the balance of the Chicago area demand.
>
> Master Plan, Volume XI, p. V-6 (emphasis added).

50. The City acknowledges that some of the 1995 hub demand will be sent to other hubs:

> The selection of the constrained role for O'Hare and an Alternative 2 level of development for Midway will not fully accommodate the forecast level of demand for the Chicago Metropolitan Area in the planning time period.
>
> * * *
>
> . . . [I]t can be assumed that this unsatisfied demand will . . . be diverted to other air carrier connecting hubs such as St. Louis, Kansas City and/or Dallas/Fort Worth.
>
> Master Plan, Volume XI, pp. V-6 to V-7.

51. The FEIS makes no mention of the use of other hub airports in other cities as a means of accommodating the forecast demand. Its analysis of the use of other airports is a cursory rejection of the use of either existing or new Chicago area airports. In contrast, the FAA elsewhere states that the use of other hub airports is a feasible alternative for accommodating demand and relieving congestion at busy hubs such as O'Hare:

> . . . [M]any of the major congested airports serve as connecting points for domestic and international air carrier traffic. ORD [O'Hare], ATL, DEN, and JFK are prime examples. Less congested airports could serve a part of the connecting air carrier traffic now using congested hubs, thereby relieving congestion and reducing delay. . . . Active coordination of shifts in connecting traffic may also achieve diversion of air carrier traffic from congested hubs and provide better transportation with less capital expenditure.
>
> *Airfield and Airspace Capacity/Delay Policy Analysis*, FAA (December 1981), pp. 117-118.

52. Certainly, diversion of connecting traffic to other hubs in lieu of jamming the traffic into O'Hare is a feasible and prudent alternative that should be explored for varying levels of traffic demand for the Chicago hub. Based on Chicago's and the FAA's own statements, it would be feasible to cap operations at a level lower than 950,900 operations and send the excess traffic to other hubs. Chicago's situation is particularly suitable for the use of other hubs since many of the air carrier passengers using Chicago are interconnect passengers to other cities who never set foot outside the terminal. Their interconnections can be made in other hubs. The FEIS discusses neither the economic benefits nor environmental impacts of such alternatives.

## (3) A NEW AIR CARRIER AIRPORT

53. Though there is no reason why the use of other hubs cannot be a long-term alternative, Chicago has explicitly stated that, if no new runways are built at O'Hare, a new air carrier airport in the Chicago area will be necessary.

> If connections are off-loaded from O'Hare [this is the cap on operations of 950,000 at O'Hare with use of other airports] and Midway is used in an air carrier role (Alternatives 3 and 5) [Midway runways expanded], a reduced level of O'Hare development [no new runways 950,000 operation] is required to meet the 1995 origin and destination passenger needs, but *another major airport will be required to accommodate the remainder of the unconstrained growth thereafter.*
>
> Master Plan, Volume XI, p. V-1 (emphasis added).

54. This statement by Chicago of the need for a new air carrier airport in the Chicago area to accommodate the forecast demand is very significant. As discussed above, the only alternatives identified by Chicago to meet this long-term demand are: 1) two new runways; 2) cap on O'Hare operations with use of other airports; or, 3) a new air carrier airport. If Chicago rejects long-term use of other airports and does not investigate the development of a new airport, the inevitable alternative will be the construction of two new runways at O'Hare.

55. In its manuals entitled *Planning the Metropolitan Airport System* and *Airport Master Plans* the FAA describes what should be done when the forecast operations demand and airfield capacity analysis indicates that there will be unsatisfied demand (i.e., that forecast demand exceeds existing capacity)—look for a new airport.

> At this point, the ability of the existing airports to accommodate the additional capacity that is required should be ascertained. Where it is clear that an unsatisfied balance of demand will exist, the need for new airport locations will be indicated . . .
>
> *Planning The Metropolitan Airport System*, p. 53.

56. The FAA carefully points out that where demand exceeds the capacity of the existing airports and the need for a new airport is indicated, expansion of existing facilities such as O'Hare may not be needed:

> . . . [I]f a new air carrier airport is needed, a new split in airline operations will result and a shift of substantial numbers of operations to the new airport may *preclude the requirement for extensive expansion at the existing airport.*
>
> *Planning The Metropolitan Airport System*, p. 53 (emphasis added).

57. Despite the clear statement by Chicago as to its perceived need for a new air carrier airport, (or two new runways at O'Hare) both Chicago and the FEIS reject a new air carrier airport without any evidence of investigation or analysis.

58. Chicago rejected the option of investigating a new airport in its Master Plan for the following reasons:

> In the formulation of the master plan study objectives, the option for the construction of a new, third air carrier airport facility was ruled out. Realizing early on that *severe problems* were evident with the *existing* facilities, a third airport was considered by some to be an option. However, lacking an available site that was *large enough* and *close enough* to the City, acquirable at a *reasonable cost*, and *environmentally acceptable* for *economically feasible* airport development made this option well beyond the *twenty year* planning time frame of this Master Plan Study.
>
> Master Plan, Volume XI, p. I-1 (emphasis added).

59. This single paragraph, replete with subjective and unsubstantiated statements, stands as the only discussion of a new airport alternative in an *Alternatives* analysis encompassing well over one hundred pages in the Master Plan, which in turn is based on hundreds more pages of analysis of various capacity expansion alternatives at the O'Hare site.

60. Moreover, the FEIS simply parrots Chicago's vague generalization that no airport site is "large enough" or "close enough" that is aquirable at "reasonable cost" and is "environmentally acceptable". The FAA says that development costs would be "extreme". (FEIS at p.22). There is no discussion of the economic or environmental impact criteria which a new airport would have to meet. There is no analysis of the meaning of "large enough" or "close enough", what level of cost would be "reasonable", or what would be "environmentally acceptable" or "economically feasible."

61. This summary rejection of the new airport alternative, without any analysis of economic benefits and costs or environmental impacts, is negligent at best and intentionally misleading at worst. This summary rejection is even more irrational in light of Chicago's own statements regarding future air traffic demand. A new airport is exactly what Chicago says will be needed to address demand after 1995—eleven years away. In speaking of the air traffic demand for 1995 and beyond, Chicago has stated:

> . . . [A]nother major airport will be required to accommodate the remainder of the unconstrained growth thereafter.
>
> Master Plan, Volume XI, p. V-1.

62. Other large metropolitan areas such as New York and Los Angeles have developed more than one airport to meet metropolitan air traffic demand. There is no analysis in the FEIS as to why these cities have successfully developed additional airports and Chicago cannot.

63. The complete lack of specificity as to the size of the site needed, the distances the site would need to be from existing airport and urban centers, the levels of cost that would be involved, and the criteria for economic and environmental feasibility stands in stark contrast to the FAA manual on Airport Master Plans and sound economic planning generally. Before rejection of an alternative of a new airport, one would first have to determine at least the following elements.

a. The size of the new airport, based on the number of aircraft operations of the forecast metropolitan demand the new airport was to service. Neither Chicago nor the FEIS ever describe the size and facilities that would be necessary at a new airport. That would depend on the how much of the forecast aircraft operations demand was allocated to the new airport. Under any new airport alternative, O'Hare would likely still continue to service a sizable portion of the total metropolitan demand.

b. A plotting of possible sites for a new airport. Other than a cursory mention of an airport site in the lake and one in northwest Indiana, there is no evidence of investigation or exploration of sites in other sectors of the greater Chicago metropolitan area. The FEIS makes no investigation of sites to the south, southwest, west, northwest or north of Chicago.

c. An investigation of land costs at each potential site. The FEIS makes no mention of any investigation of land costs for prospective airport sites. Yet land costs are a key component in any assessment of the economic feasibility of any new airport.

d. An investigation of quantity and unit costs for construction of physical facilities at a new site. In the field of major capital construction, the unit costs for capital construction are often less in a a so-called "greenfield site" than the costs for comparable capital construction at an

> Hybrid measures use a combination of administrative and economic techniques to control demand. For example, the operational surcharge on general aviation movements during peak periods which was imposed by the Port Authority of New York and New Jersey in 1968 coupled with the "quota system" that the FAA imposed in 1969 created such a hybrid environment in the New York area.
>
> *Airfield and Airspace Capacity/Delay Policy Analysis,* p. 122.

70. With reference to economic rationing devices (e.g., congestion tolls), the use of capacity limits (e.g., operational quotas), and the allocation of traffic demands to other hubs, the FAA has stated: "All three methods could be used in combination to form hybrids." *Id.* at p. 117.

71. Nowhere in the FEIS is there any discussion or evaluation of these non-structural means of accommodating a large and growing demand—either as to economic costs and benefits or environmental impacts.

## (5) OTHER MODES OF TRANSPORTATION

72. Still other non-structural alternatives to accommodating growing demands are feasible and require analysis. A most important one is the use of alternative means of transportation such as auto, rail, or bus for short-haul traffic. As the FAA and the City of Chicago acknowledge:

> Alternate modes of transportation, such as rail, bus, or automobile, offer feasible alternatives to the air travelers, particularly those traveling 250 miles or less.
>
> FEIS, p. 20

And, there is substantial forecast air traffic projected for O'Hare involving distances of less than 250 miles. (See Master Plan, Volume IV).

73. Despite such acknowledgment, the FAA and Chicago have failed to examine either the benefits, costs or environmental impacts of the use of alternative modes in lieu of short-haul air traffic. The FAA dismisses the viability of alternative modes, with the undocumented and unsubstantiated statement:

> Based on the characteristics of air travelers, alternative means of transportation, such as rail or automobile, cannot be realistically considered as providing a suitable long-term solution to the current congestion problem at O'Hare Airport. Alternative modes of transportation do not meet the needs or desires of the types of travelers using O'Hare.
>
> FEIS, p. 21.

74. This claim is without basis. No serious observer would suggest that alternative modes supplant all O'Hare air traffic; however, alternative modes can well serve as part of a hybrid strategy. And the reference to unquantified "needs or desires" of the air traveler hardly seems appropriate coming from planners who nowhere in their analysis of listed alternatives discussed or analyzed these "needs or desires", even in the face of large and growing congestion.

## C.

## ADEQUACY OF THE ANALYSIS OF ECONOMIC COSTS AND BENEFITS

75. At this point in my affidavit, it is useful to recapitulate where we are in the decisionmaking stages followed by Chicago and the FAA in deciding on this expansion project.

76. Thus far we have progressed through the first two stages of decisionmaking used by Chicago and the FAA. We have identified the proponents' objectives—meeting the long-term (20-year) aircraft operations demand at acceptable levels of delay. Next we have examined the alternatives available to address these objectives. These include the alternatives identified by Chicago to meet these objectives: a) two new runways;

b) a cap on operations with the use of other airports; and, c) a new air carrier airport. As discussed above, these alternatives are not analyzed in the FEIS. Other alternatives identified by the FAA in other documents, but never analyzed by Chicago or the FEIS, include nonstructural means of reducing demand and use of other transportation modes in a mix of alternatives to meet the objectives.

77. The next decisionmaking step used by the FAA and Chicago is the comparison of the identified alternatives on the basis of economic benefits and costs. (See par. 10(c) and Step 5 of par. 14 above). Also compared are the environmental impacts of the various alternatives. As explained by the FAA, the economically desirable alternative is identified as follows:

> The benefits of each alternative are then valued in dollars and compared to their expected costs. That alternative for which benefits exceed costs by the greatest amount is identified as the project alternative to be undertaken. The action is worth taking because benefits exceed costs. It is best because benefits exceed costs by the greatest amount.
>
> *Economic Analysis of Investment and Regulatory Decisions—A Guide,* p. 2-4.

78. Chicago states that it used this benefit/cost comparison of alternatives as the basis for choosing which alternative would be selected:

> As a basis for selecting the most desirable development alternative, the ratio of the 1995 total anticipated benefits over the total program costs was defined for each of the alternative development scenarios for O'Hare and Midway.
>
> Master Plan, Volume XI, p. V-3.

79. Chicago states that it used this benefit/cost analysis in reaching its decision to temporarily select the cap on operations with use of other airports alternative at O'Hare:

> On the basis of benefit/cost relationships, coupled with the high level of community concern for airport noise, the attendant social costs and the questionable ability to implement plans requiring new runways, a city policy decision was made to proceed with planning based upon the role identified as Alternative 4 (constrained development with 120-130 domestic gates) utilizing the existing O'Hare runway configuration. . . . [I]t was decided to use Midway to serve part of the scheduled commercial carrier activity, in selected short-haul markets, that would have to be diverted from O'Hare. Thus, Alternative 2 was selected for Midway [no expansion but use of Midway as air carrier facility for 29% of short haul traffic], effectively postponing the time when new aviation facilities will be needed to serve the balance of the Chicago area demand.
>
> Master Plan, Volume XI, p. V-6.

80. As described above, Chicago noted that under this "constrained" alternative, some of the 1.4 million metropolitan aircraft demand would be sent to other airports in other cities. (See paragraph 63 above).

81. The FEIS acknowledges that Chicago conducted a benefit/cost comparison of some of the alternatives identified by Chicago to meet the 20-year long-term aircraft operations demand. (See p. 24 of the FEIS).

> For each of the above scenarios, order of magnitude development costs were made from projections of facility requirements, as well as estimates of the environmental impacts, operational costs, and economic benefits associated with the respective aviation activity allocations (See Volume XI of the Chicago O'Hare Master Plan Study). This information served as a basis for the selection of the level of development desired for O'Hare and Midway.
>
> FEIS, p. 24.

existing operating facility such as O'Hare. Yet there is no investigation of the quantity and unit prices for construction of the physical facilities at prospective new sites.

e. The environmental impacts of such prospective airport sites. O'Hare is located in a densely populated suburban area. A new site with land buffers acquired at the time the site is constructed could have much less adverse environmental impact than expanded operations at O'Hare.

f. The accessibility of such sites to major transportation corridors such as expressways. Again, other major metropolitan areas such as Los Angeles and New York are operating high volumes of commercial air traffic using multiple airports. These multiple airports are accessed from both major commercial centers and other airports by means of a variety of transportation corridors.

64. These are some of the factors which any reasonable planner would investigate before rejecting a new airport as not feasible. (See e.g., *Airport Master Plans,* at pp. 28-30.) The vague generalities contained in the Master Plan and the FEIS constitute an unreasonable and irrational basis for reaching a judgment on the construction of a new airport.

65. Contrary to the City's argument in its Master Plan (which was adopted by the FAA in the FEIS) a 20-year time frame is not too short a period for designing and constructing a new airport. If a new airport is needed, the longer the delay in locating and designing the new airport, the greater the difficulty there will be in locating and implementing a new site. If Chicago waits until the demand reaches the level of intolerable delays at O'Hare to begin investigating a new airport site, site location and acquisition will be more difficult and more expensive. The only other alternative identified as desirable by Chicago to accommodate traffic and reduce delays—two new runways—will become a *fait accompli.*

66. This "piecemeal" segmented approach to meeting the projected 20-year long-term demand through incremental expansion investments at O'Hare will make construction of two new runways virtually inevitable, and is an economically irrational method of decisionmaking. This piecemeal process effectively precludes the consideration of other less environmentally damaging alternatives.

67. Nor is there any pressing economic need to press forward with a billion dollar expansion while such alternatives are being considered. Chicago has already acknowledged that during the period a new airport is being evaluated, interconnect traffic growth can be accommodated at other existing airports in other cities as either a short or long-term alternative.

## (4) OTHER ALTERNATIVES

68. As described above, the FEIS failed to investigate and evaluate the alternatives of: a) two new runways; b) a cap on operations with use of other airports; and, c) new air carrier airports. Additional alternatives to address these objectives are identified by FAA in other documents, but are never identified in the FEIS.

69. In addition to traffic diversion to other hubs, there exist numerous other non-structural means of accommodating increasing transportation demands with existing facilities. Some of these alternatives, which have long been recognized by transportation planners and the FAA, involve more efficient use of existing facilities or rationing devices designed to eliminate or reallocate low valued demands. These techniques include such devices as quotas on the number of flights, congestion tolls, or hybrid combinations of these and similar non-structural controls. As pointed out by the FAA, administrative limits or economic rationing or hybrid combinations are available to control demand:

82. The benefit/cost comparisons for the two basic O'Hare alternatives—two new runways (Alternative traffic splits 0-3), and cap at 950,900 with use of other airports in other cities (Alternative traffic splits 4 and 5)—are contained in Table V-1, Master Plan, Volume XI, p. V-2. The only differences between the two runway alternatives are the degree of traffic allocated to Midway. Similarly the only differences in the cap on operations alternatives with use of other airports (Alternatives splits 4 and 5) are the respective uses of Midway.

83. Applying well-accepted economic standards recognized by the FAA, there are several things wrong with this benefit/cost analysis. Indeed the benefit/cost information given is so sparse and so improper under standard economic principles as to render the analysis irrational. The errors are numerous but fall into three major categories:

A. *Failure to do a benefit/cost analysis of other alternatives.* Chicago and the FAA failed to do a benefit/cost comparison of other feasible alternatives such as those identified above. The only way to make a rational comparison among alternatives is to compare all alternatives as to their respective benefits, costs and environmental impacts. Particularly glaring is Chicago's and the FAA's failure to compare the benefits and costs of capping operations at O'Hare at lower levels and using other hub airports. Such alternatives would have substantial economic benefits from the standpoint of noise reduction and delay savings over the alternative selected by Chicago. Similarly, a new airport or non-structural controls on demand might produce substantial economic benefits from noise reduction and reduction in traffic delay.

B. *Serious errors in cost computation.* Chicago's benefit/cost analysis is seriously misleading and incomplete from the standpoint of costs. Serious errors in cost computation include:

(1) The City and the FAA fail to disclose the raw data, calculations and methodology used to support the

delay cost claims shown in Table V-2, Master Plan, Volume XI, p. V-5. Indications are that these relatively low levels of delay costs, especially for alternative splits 4 and 5, assume the installation of air traffic control technology which has not yet been established as technically feasible. Without such technology, the delay costs imposed by jamming 950,900 aircraft into O'Hare will be much higher.

(2) There is no evidence that the City included in its delay cost computations the delay costs to air travelers or to the airlines from the expanded traffic. The FAA has published cost data for the value of each hour of delay to the average air passenger and cost data for airline delay costs (see *Economic Values For Evaluation of Federal Aviation Administration Investments and Regulatory Programs*, FAA-APO-81-3, September 1981). It is impossible to determine whether such delay costs are included in Table V-2.

(3) There is no evidence that the City included the costs of noise damage in its benefit/cost calculation. The FAA has acknowledged elsewhere that aircraft noise causes a decline in property values. (see *Final Regulatory Evaluation: Metropolitan Washington Airports Policy* (FAA 1981), p. 43).

(4) Chicago has failed to include the financing costs of the expansion proposal. Financing costs are a major component of the overall cost of the project. Just as it would be foolish to build a nuclear power plant, a sewage treatment plant, or even a home without including the financing costs in the costs of the project, so also is it irrational for the City of Chicago to fail to include the long-term financing costs of the expansion in its benefit/cost analysis.

C. *Serious errors in benefit computation.* On the benefit side of the equation, the City of Chicago makes equally serious errors:

(1) The City never examined the economic benefits of reduced noise and reduced delay which would result from a lower number of operations at O'Hare. Based on all the evidence available, lowering the number of operations below the level proposed by the City at O'Hare would produce substantial economic benefits.

(2) The City of Chicago and the FAA claim as the economic "benefits" of expansion of O'Hare the "direct and induced employment payrolls and passenger expenditures". (Master Plan, Volume XI, p. V-3). These claims of payroll benefits and passenger expenditures are not proper economic benefits attributable to the project; they bear no relationship to any accepted measure of economic benefits. These so-called benefits are not attributable to airport expansion at O'Hare; they would accrue wherever the air traffic goes. Indeed, a new airport in the Chicago metropolitan area would produce substantially more jobs and passenger expenditures than the proposed O'Hare expansion. Under accepted economic principles, the only proper economic benefits attributable to any airport expansion project are the value of the services to air travelers who would not be served but for the expansion, coupled with any reduction in costs experienced by air travelers, the airlines and the noise impacted public from such a project.

(3) The City claims benefits generated by 950,900 operations based on a physical throughput capacity calculation for O'Hare. Yet as discussed above, Chicago acknowledges that the "economic capacity" of the airport will be far less due to intolerable delays and that 950,900 flights will not occur under currently available technology

unless two new runways are built. Since there is no basis for concluding that the existing O'Hare airfield will be able to economically accommodate 950,900 flights, it was improper to claim the benefits from those operations.

84. Another serious problem in the benefit/cost computation is the time horizon used by the City and the FAA for deciding on the expansion project. Despite FAA manual direction to forecast on the basis of 20-year needs, the benefit/cost comparison begins and ends eleven years from now—in 1995. Yet the economic life of these facilities extends well beyond the year 2000.

85. No rational plan would propose a one and one-half billion dollar project, with economic and environmental implications extending for several decades, on the basis of an eleven year planning horizon. Clearly air traffic demand growth at some level will continue beyond 1995. Moreover, the facilities which the City is proposing to build have an economic existence well beyond 1995 and will be serving air traffic demand well beyond 1995—indeed well into the next century. Moreover, the financing mechanism chosen by the City—revenue bonds paid out of aircraft landing fees with a thirty-year payment schedule—are to be paid by air traffic over that 30-year period. From an economic perspective, (comparing economic benefits and costs) a proposed expansion and its alternatives should be compared over the entire economic life of the project. In this case, a rational planning time frame would be the life of the bonds used to pay for the project—i.e., 30 years. In no case should the planning period be less than the 20-year period called for by the FAA in its Airport Master Plan manuals.

86. Another serious problem in the comparison of benefits and costs is Chicago's use of capacity. The faulty concept of capacity used by the City of Chicago and the FAA, in combination with the limited time horizon of the analysis, has inevitably led to selection of a proposed plan that will lead to less adequate service to Chicago air travelers, more congestion

at O'Hare, and the irreversible commitment of resources to an enormous expansion of air traffic at O'Hare Field.

87. The City of Chicago has stated that it is building gates and other terminal facilities to handle what the City says are the 920,600 operations which will be arriving at O'Hare in 1995. Chicago states these operations will be accommodated by the airfield capacity of O'Hare Field. In reality, as noted above, there will be enormous congestion at this traffic level. Hence, terminal facilities designed for 920,600 operations will be far in excess of the airfield capacity of the airport at reasonable levels of delay. According to Chicago's own forecast, the terminal facilities for 920,600 operations will be far out of balance with the practical capacity of the airfield. As discussed above, the resulting delays will become so bad, that either the curtailment of traffic or the construction of new airfield facilities—e.g., two new runways—will be required:

> . . . [T]he system would begin to deteriorate very rapidly between 1985 and 1995; and that delay and congestion conditions would become increasingly intolerable after 1985. At some point during that time frame, it would become necessary to either curtail traffic or to begin to rely heavily on the addition of new [airfield]facilities.
>
> Master Plan, Volume VII, pp. III-17.

The only airfield facilities at O'Hare which Chicago has identified to reduce these expected delays are the two new runways contained in alternatives 0-3 listed on page 24 of the FEIS.

> Annual delay becomes much less pronounced with the addition of two new runways.
>
> Master Plan, Volume VII, p. IV-19.

88. Clearly, using the physical capacity of the airfield as the basis for sizing the terminal facilities, when Chicago knows that delays on the existing field will force much lower traffic levels, pre-ordains the construction of two new runways.

## D.

## FAILURE TO DISCLOSE

89. The analysis set forth above demonstrates that Chicago and the FAA have failed to follow basic principles of economic analysis in selecting the proposed expansion project. The FEIS fails to clearly articulate the objectives of the project expansion project—i.e., meeting the 20-year aircraft operations demand. The FEIS fails to identify and explore feasible alternatives to meet the objective, including the project alternative actually selected by Chicago and the other two alternatives which Chicago says will be necessary if the use of other city airports is not pursued. The three alternatives identified by Chicago as essential are either: a) two new runways at O'Hare; b) a cap on operations with use of other airports; or, c) a new air carrier airports. Chicago has said that one of these alternatives must be implemented, yet the FEIS rejects all three. By doing so, the FAA and Chicago have made the construction of two new runways virtually inevitable. The FEIS is also based on a project selected by means of an erroneous benefit/cost analysis which fails to include basic benefits and costs required for sound analysis, and which instead includes certain improper benefits and costs.

90. Pervading this entire project analysis in the FEIS is the failure to disclose essential information. The FEIS fails to meet the basic requirement that the key data, methodology and calculations which form the basis for the FAA's factual assertions be disclosed. The FEIS fails to disclose key information about demand forecasts, airfield capacity and alternatives. This withheld material is critical to the identification of the need for expansion, the identification of alternatives, and the quantification of economic costs and benefits, as well as environmental impacts.

91. For example, the two key pieces of information in any evaluation of the need for expansion of O'Hare are the 20-year

metropolitan aircraft operations demand and capacity calculations for O'Hare Field. In the Chicago Draft EIS and in the FEIS, a new 20-year metropolitan aircraft operations forecast was used. Yet, at no time was the new 20-year metropolitan aircraft operations forecast disclosed. Nor was the traffic split between O'Hare and Midway implicit in this new 20-year forecast disclosed. The 20-year operations forecast used in the Master Plan was 1,412,000 operations. That number has apparently been abandoned by Chicago and the FAA, but neither Chicago nor the FAA has disclosed the new 20-year operations forecast or the data, methodology or calculations leading to that new forecast. Yet, it is this forecast—together with the analysis of capacity/delay—which determines the need for expansion, the alternatives available and the environmental and economic impacts of these alternatives.

92. Similarly, the FEIS fails to disclose the data, calculations or methodology supporting Chicago's claims as to either the physical or the "practical capacity" of O'Hare airfield. Chicago has apparently used the "practical capacity" figure of 840,960 operations to identify the level of operations and environmental impacts under the "do-nothing" approach. Chicago and the FAA have stated that the "physical capacity" of the airport is 950,900 operations and have used that figure to identify alternatives and to evaluate the impacts under the "with project" approach. Nowhere does the FAA ever provide empirical data, methodology and calculations for asserting that 840,960 operations is the "economic" or "practical" capacity of O'Hare. Nowhere does the FAA provide any basis for Chicago's assertion that 950,900 operations is the physical capacity of O'Hare. Yet such capacity calculations, in conjunction with the demand forecast, drive the entire process of determining need, identifying alternatives, quantifying economic benefits and costs, and quantifying environmental impacts such as noise and air pollution.

93. At a minimum, what is needed is full disclosure of Chicago's current 20-year aircraft operations demand forecast, the allocation of that traffic to O'Hare and Midway, and the current practical and physical capacity analysis for O'Hare. It is clear that if 20-year metropolitan aircraft operations demand for O'Hare and Midway follow the forecast pattern contained in Chicago's Master Plan, the forecast demand will overwhelm both the so-called "practical" capacity and even the physical capacity of the O'Hare airfield. Under those circumstances, Chicago has emphatically stated that its only alternatives are either: a) two new runways at O'Hare; b) cap on operations with use of other airports; or, c) constructing a new air carrier airport.

94. The FEIS fails to disclose that these are the three alternatives identified by Chicago to meet the forecast air traffic demand. Indeed the FEIS fails to disclose that the short-term alternative selected by Chicago involved the use of other airports. The FEIS rejects the use of other airports even though Chicago selected that option.

95. Without disclosure of such basic information, neither the public, independent experts nor the court can independently evaluate the conclusions reached by the City and the FAA.

FURTHER AFFIANT SAYETH NOT.

/s/ ROBERT H. HAVEMAN
Robert H. Haveman

SUBSCRIBED AND SWORN TO
before me this 3rd day of
December, 1984.

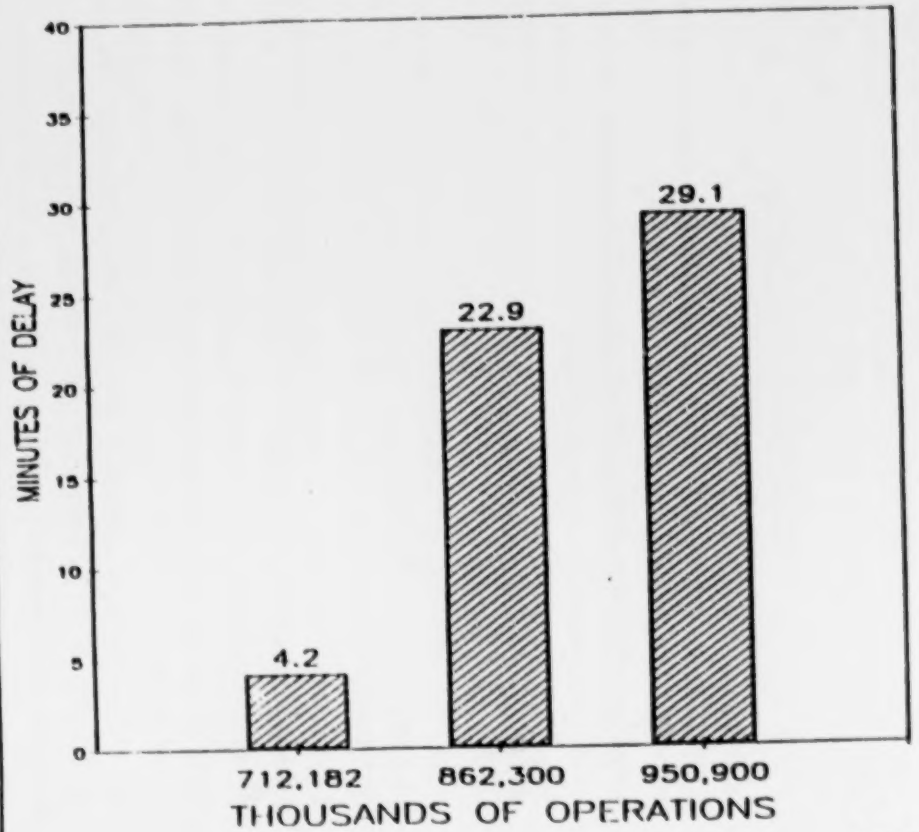
SANFORD GAIL
Notary Public

BEST AVAILAB



EXHIBIT 1

# AVERAGE ANNUAL DELAYS PER AIRCRAFT




Source: Master Plan, Vol. VII, p.IV-17

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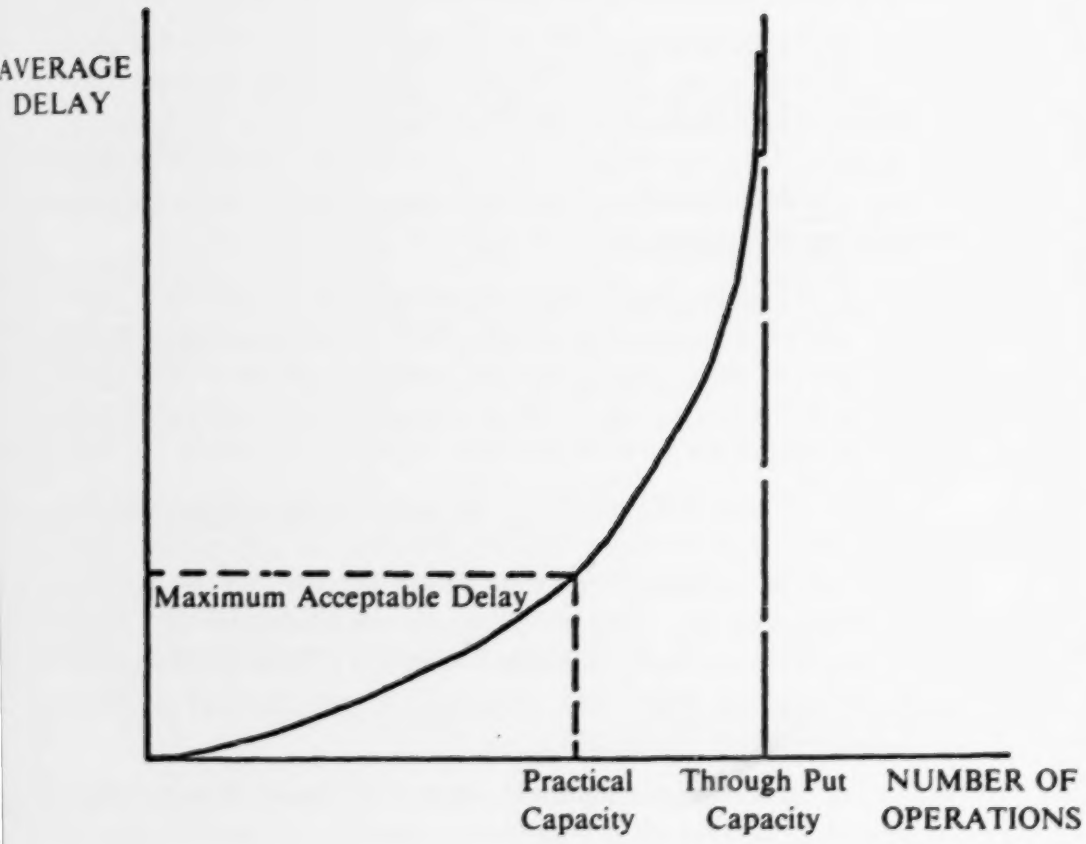
**FIGURE 1**

**RELATIONSHIP BETWEEN CAPACITY AND AVERAGE DELAY**




*Airfield and Airspace Capacity/ Delay Policy Analysis*, FAA-APO-81-14 (FAA, December 1981), p.11

**EXHIBIT 2**

## AFFIDAVIT

JOSEPH L. CARROLL, having been duly sworn, on oath deposes and states that:

1. My name is Joseph L. Carroll, and I reside in Centre Hall, Pennsylvania.

2. I presently serve as Director of the Transportation Systems Program, Pennsylvania Transportation Institute, The Pennsylvania State University. I also serve as a Professor of Business Administration, College of Business Administration at the same University. I am a transportation economist by training and experience.

3. Within the field of transportation economics I have focused on the evaluation of the need for, and alternatives to, publicly financed transportation projects. Of particular relevance to my testimony in this case has been my extensive work in the evaluation of transportation capacity and delay.

4. I have been asked by the member communities of the Suburban O'Hare Commission to evaluate the City of Chicago's proposal to expand facilities at O'Hare Airport and the analysis of the expansion project proposal contained in the *Final Environmental Impact Statement Chicago O'Hare International Airport,* dated May 1984, prepared by the Federal Aviation Administration (hereafter Final EIS).

5. The expansion project which the Final EIS purports to evaluate is based on a "Master Plan" prepared by Chicago to identify and select the airport facilities necessary to accommodate the long-term air traffic operations demand for the Chicago Metropolitan Area. As stated by Chicago, the purpose of the Master Plan was to:

> . . . define and quantify the development of air carrier airport facilities to meet the long-range future needs of the Chicago Metropolitan Area.
>
> p. I-1, Master Plan, Volume XI.

6. As described below, Chicago and the FAA had to first define the "long-range future needs," identify alternatives to meet those needs, investigate the economic and environmental impacts of those alternatives, and select from those alternatives a project which met the long-term needs. To accomplish these tasks, Chicago and the FAA had to answer two key questions:

a. What is the expected level of aircraft operations (takeoffs and landings) at Chicago's air carrier airports in the next 20-years? i.e., through 2005?

b. What is the capacity of O'Hare and Midway to accommodate the forecast numbers of aircraft operations?

7. The investigation of and answers to these two questions are basic to the entire decisionmaking process for Chicago and the FAA in deciding on an expansion proposal for O'Hare. The answers to these questions determine:

a. whether forecast demand (aircraft operations) exceeds supply (airport capacity);

b. what alternatives should be considered to meet the forecast demand, e.g., expansion of O'Hare, a new airport, or greater use of other airports, etc.;

c. what the expected environmental and economic impacts are of the different alternative approaches to accommodating aircraft operations demand, including the impacts of the alternative selected by Chicago as well as the impacts of the so-called "do nothing" alternative.

8. Despite the central role played by the forecast of long-term aircraft operations demand for the metropolitan Chicago area and the calculation of aircraft operations capacity, these key issues are not analyzed in the Final EIS:

a. Nowhere in the Final EIS is there any disclosure or analysis of the current forecast of long-term 20-year aircraft operations demand for the Chicago Metropolitan

Area. As described below, this 20-year operations forecast was purportedly used by Chicago and the FAA to determine O'Hare's future long-term demand as well as to determine impacts and identify alternatives.

b. Nowhere in the Final EIS is there any detailed discussion or analysis of the aircraft operations capacity of O'Hare. Yet this aircraft operations capacity was presumedly the basis for selection of the expansion alternative now proposed by Chicago to meet long-term demand.

9. The failure of the Final EIS to disclose, discuss, and analyze these long-term aircraft operations demand and airfield capacity calculations has led to a Final EIS that is incomplete, confusing, contradictory, and misleading. As explained in detail below, I conclude that the Final EIS is seriously deficient:

a. The Final EIS fails to disclose, identify and analyze critical data and calculations central to the sizing of the proposed project, central to the analysis and evaluation of alternatives, and central to the calculation of environmental impacts. Critical information missing from the Final EIS includes a current 20-year long-term forecast aircraft operations demand for the air carrier airports in the Chicago metropolitan area, the split of that traffic between O'Hare and Midway, and the data and assumptions underlying the calculation of the capacity of O'Hare.

b. The Final EIS fails to identify the project alternative selected by Chicago. As described below, Chicago says that it selected an alternative to meet long-term aircraft operations demand which includes: a) both a limit (hereafter "cap") on operations at O'Hare; and, b) the use of other airports outside the Chicago metropolitan area. The Final EIS fails to even identify this alternative as the one selected by Chicago, and explicitly rejects the use of other airports as not feasible. This rejection is completely arbitrary in light of Chicago's recommended use of other

hub airports and FAA's suggestion in other studies that use of other hub airports is a feasible alternative to capacity expansion.

c. Use of other hub airports with a cap on operations at O'Hare is a feasible alternative which could meet forecast demand and impose substantially fewer operations—and correspondingly less environmental damage—on O'Hare than are forecast over the next 20 years. This alternative can be structured at several different levels of operations, all of which could meet the forecast demand. There is no analysis of these alternatives in the Final EIS. The structure of these alternatives must await disclosure of the 20-year demand forecast.

d. Chicago's Master Plan concluded that the long-term aircraft operations demand could only be met by: a) a cap on operations at O'Hare with the use of other airports; b) construction of additional runways at O'Hare; or, c) construction of a third air carrier airport in the Chicago area. Apparently, Chicago views the first alternative as a "stop gap" measure only, and stated unequivocally that with a cap on O'Hare, another major airport *will be required* to accommodate air traffic operations within the Master Plan time frame (20 years). Given that Chicago does not want to pursue long-term use of other hub airports, the only two alternatives Chicago believes should be considered to accommodate long-term demand are two new runways at O'Hare or a new airport.

e. The Final EIS summarily rejects the alternative of a new air carrier airport with no defensible rationale provided for the rejection. Yet Chicago has claimed that either a new airport or two new runways at O'Hare are the only ways to meet long-term forecast demand. Additionally, the FAA has explicitly stated elsewhere that where existing airport facilities cannot be expanded (such as by the addition of new runways) to meet the 20-year forecast

of aircraft operations demand, the construction of a new airport should be investigated.

f. Having rejected consideration of a new air carrier airport and the use of other existing airports to meet Chicago's long-term operations demand, the Final EIS fails to identify the economic and environmental impacts of the only other option identified by Chicago, the addition of two new runways at O'Hare.

g. The Final EIS fails to explore other alternatives identified by the FAA and Chicago to deal with the situation where forecast long-term aircraft operations demand exceeds supply. These alternatives involve different methods of reducing operations demand through quotas, congestion charges and other administrative or economic constraints. The FAA in other publications has suggested the use of such alternatives, as did Chicago in the Master Plan, as a means of reserving O'Hare's aircraft operations capacity for scheduled carriers. The Final EIS also fails to seriously consider alternative forms of transportation to relieve short-haul aircraft operations demand.

h. The project selected was based on a benefit/cost comparison of alternatives which was not included in the Final EIS and which failed to include critical cost elements used elsewhere by the FAA in considering airport expansion alternatives. Key among the missing costs are the costs to property owners from increased noise and, conversely, the benefits from decreased noise. FAA has used property damage costs caused by noise in its own airport expansion evaluation criteria. Similarly, the benefit/cost analysis performed by Chicago failed to include the costs of delays to air travelers that will be caused by the expansion project. Again, the FAA includes these delay costs to travelers in its own benefit cost evaluations of airport expansion proposals elsewhere.

10. As described in this affidavit, most of the errors contained in the Final EIS stem from the failure of the FAA to disclose the basic data used by the FAA and Chicago, the analytical methods used to evaluate the data, and the assumptions underlying the analysis. Without a complete disclosure of the critical data, methodology and assumptions used by the FAA and Chicago, it is impossible for the public, an expert in transportation, or the Court to understand what the FAA did. Without such disclosure, there is no basis for the public, an expert, or the Court to accept the justification for the project selected, alternatives rejected, and the environmental impacts claimed.

11. To assist the Court in following my reasoning I have organized my affidavit as follows:

a. a brief description of the concepts and terminology used by the FAA and transportation economists and planners in determining the need for airport expansion. Chicago purported to follow the "Master Planning" process used by the FAA around the country to determine the need for airport expansion. The Final EIS is based on the Master Planning process.

b. a description of Chicago's actions in planning and selecting the proposed expansion and the FAA's review of that proposal; and

c. a statement of my conclusions about the Final EIS;

## A. THE CONCEPTS AND TERMINOLOGY USED BY THE FAA IN EVALUATING AIRPORT EXPANSION NEEDS AND PROPOSALS

12. The Final EIS is a difficult document to follow. It is supposedly based, however, on what should be a straightforward analysis of demand and capacity used by the FAA around the country in evaluating airport expansion needs.

that demand with available supply (capacity) to see if any new facilities are required to increase capacity in order to accommodate forecast demand.

> An analysis of the air traffic capacity of the existing metropolitan area airports leads to a determination of how much and when additional capacity is required to accommodate forecast aviation demand.
>
> *Planning The Metropolitan Airport System*, p. 53.

20. This analysis is done in the following manner. First, the metropolitan area demand is split among the existing area airports, and the capacity of each airport to accommodate the demand allocated to it is calculated. When the demand exceeds the supply, various alternatives to meet the unsatisfied demand must be identified and evaluated. As stated by the FAA:

> . . . [T]he forecasted demand is imposed on the system, distributed in accordance with demand patterns that would exist if no new airports were considered in the system, and the additional capacity required (runways and taxiways) is determined. At this point, the ability of the existing airports to accommodate the additional capacity that is required should be ascertained. Where it is clear that an unsatisfied balance of demand will exist, the need for new airport locations will be indicated . . . .
>
> *Planning The Metropolitan Airport System*, p. 53.

21. Where forecast demand exceeds the capacity of the existing system and "the need for new airport locations" is indicated, the FAA cautions against expansion of existing airports until the amount of traffic to be served at the new airport is determined.

> . . . [I]f a new air carrier airport is needed, a new split in airline operations will result and a shift of substantial numbers of operations to the new airport may preclude the requirement for extensive expansion at the existing airport.
>
> *Planning The Metropolitan Airport System*, p. 53.

22. As described below, the FAA has recognized that expanding existing airports and building new airports are not the only alternative ways of addressing the situation where demand exceeds capacity. The alternatives analysis is, of course, a major factor in the Master Planning process and in environmental impact analysis.

23. Before discussing alternatives to the physical expansion of airport capacity, it is important to understand how the FAA uses the concepts of the "capacity" of an airfield.

24. The "capacity" of a transportation facility is the ability of the facility to process a certain number of conveyances (hereafter vehicles) in a specific period of time, given the physical attributes of the facility and the procedures governing its operation. The same principles of capacity and utilization apply whether the vehicles in question are cars, boats, trains or airplanes.

25. Closely associated with the capacity of any transportation facility to process vehicles in a given period of time is the amount of delay experienced by vehicles seeking to use the facility. All things remaining equal, as more vehicles use a facility, the amount of delay experienced by each vehicle increases. At low levels of utilization the average delay per vehicle rises relatively slowly, whereas at higher levels of utilization the delay experienced by each vehicle rises rapidly. This phenomenon is well known in the transportation field, and is illustrated by a graph prepared by the FAA. (Exhibit 1 attached hereto).

26. There are two popular concepts of transportation capacity: 1) the physical (or "throughput") capacity which defines the maximum number of vehicles that can be processed in a given period of time; and 2) "practical" capacity which defines a level of the throughput below physical capacity which is deemed to represent a more realistic level of facility utilization and thus implies adoption of some economic criterion.

being equal, the greater the number of operations, the greater the delays and the more severe the air pollution.

### 4. Alternatives Identification

34. The same central importance of the aircraft operations demand forecast and the capacity/delay analysis is also evident in the identification and analysis of alternatives. If demand is in excess of capacity, the basic alternatives identified by Chicago are: a) to cap operations and send the aircraft operations demand somewhere else; b) to expand the existing airport runways; and, c) to build another airport. These alternatives, or some mix of them, have been identified by the FAA as the principal alternatives available in the case where aircraft operations demand exceeds capacity.

35. For example, concerning the use of other hub airports as an alternative to expanding operations at congested hubs such as O'Hare, the FAA states:

> . . . [M]any of the major congested airports serve as connecting points for domestic and international air carrier traffic. ORD [O'Hare], ATL, DEN, and JFK are prime examples. Less congested airports could serve a part of the connecting air carrier traffic now using congested hubs, thereby relieving congestion and reducing delay. . . . Active coordination of shifts in connecting traffic may also achieve diversion of air carrier traffic from congested hubs and provide better transportation with less capital expenditure.
>
> *Airfield and Airspace Capacity/Delay Policy Analysis*, FAA (December 1981), pp. 117-118.

36. Similarly, as noted previously, FAA has suggested that where forecast demand exceeds the capacity of existing airports, new airports should be considered. Although acknowl-

edging that the siting of such airports is difficult, the FAA insists that such new airport alternatives are feasible:

> This difficulty is not considered insurmountable, however, given previous planning and discussion involving new runways or airports at Los Angeles, St. Louis, Atlanta, Denver, and elsewhere.
>
> *Airfield and Airspace Capacity/Delay Policy Analysis*, FAA (December 1981), pp. 99-100.

37. The alternatives discussed previously are predicated on increasing the available capacity to meet a given demand. Another group of alternatives, although related to the first group, is based on the concept of reducing demand instead of increasing capacity. These administrative or economic measures to control demand include congestion tolls, quotas, and other devices to reduce the demand for airport services. Again, the FAA has suggested that the use of demand control measures should be evaluated.

> Hybrid measures use a combination of administrative and economic techniques to control demand. For example, the operational surcharge on general aviation movements during peak periods which was imposed by the Port Authority of New York and New Jersey in 1968 coupled with the "quota system" that the FAA imposed in 1969 created such a hybrid environment in the New York area.
>
> *Airfield and Airspace Capacity/Delay Policy Analysis*, FAA (December 1981), p. 122.

38. Indeed, Chicago has even proposed the use of such controls to preserve airfield capacity at O'Hare for commercial aircraft.

> . . . [I]n developing the revised passenger forecast, it was assumed that competition for available airfield capacity by

> users other than the scheduled carriers would be limited during peak hours of the day by pricing or other regulatory mechanisms.
>
> Draft Environmental Impact Statement for Chicago O'Hare International Airport, Master Plan, Volume XVI, p. I.5-5.

Yet the details of these demand control "pricing or other regulatory mechanisms" are never discussed or analyzed in the Final EIS.

39. Clearly, there are a number of alternatives available that would reduce the need to expand operations at an airport such as O'Hare, and that would serve to reduce the resultant noise and other adverse environmental effects that inevitably follow capacity expansion measures. As noted above, if a new airport is built, the need for expansion of facilities at existing airports can be reduced or eliminated because the traffic allocated to the existing airports can be reduced. Similarly, sending air traffic demand to other hub airports, an alternative suggested elsewhere by FAA but ignored here, would also reduce or eliminate the need for expanded facilities and operations. Also the use of other transportation modes such as auto or rail could be used to accommodate the short-haul component of the forecast demand, thus reducing the need for more operations at the airport.

40. FAA has expressly identifed this last alternative as one that should be studied to reduce aircraft operations demand where forecast demand exceeds capacity. The FAA states:

> A re-evaluation of the unconstrained forecasts may be necessary to adjust the distribution of short/long haul passenger traffic and the cargo totals. Consideration must be given to competitive surface transport modes and their effect on the forecasts. . . .
>
> *Planning The Metropolitan Airport System*, p. 68.

41. The FAA acknowledges that expansion of operations at existing airports or building of new airports may be environmentally unacceptable. Under such circumstances, the FAA has explicitly suggested that other modes of transportation could reduce future demand for aircraft operations.

> Although existing airports may be expandable physically and economically, such expansion may be unfeasible because of a history of mass complaints from highly builtup residential areas, hospitals, schools, etc. about noise.
>
> * * *
>
> If there is no practical alternative in terms of CTOL [conventional take-off and landing] airport development, V/STOL [vertical and short take-off and landing] and other modes of transportation might be considered for reduction to constrained demand forecasts.
>
> *Planning The Metropolitan Airport System*, p. 68.

42. In summary, the steps to follow in developing the airport master plan and which have been discussed above are:

a. Develop a forecast for the long-term Chicago metropolitan area aircraft operations demand;

b. Allocate the forecast demand between existing airports;

c. Calculate the capacity of the existing airfields to accommodate the allocated forecast aircraft operations demand;

d. If the forecast demands exceeds the airfield capacity, analyze alternative means of balancing capacity and forecast demand.

e. Such alternatives according to the FAA should include:

(1) increasing capacity of the existing airfield by expanding or adding to the runways and taxiways; or

13. As the FAA Final EIS states, the subject of the analysis contained therein is the project selected as the end result of a "Master Plan" prepared by Chicago under an FAA airport planning grant. (Final EIS, p. 11).

14. As noted previously, the purpose of the Airport Master Plan developed by Chicago was to identify the long-term aviation needs of the Chicago metropolitan area and the air carrier airport facilities necessary to meet those needs. The end product of that Master Plan is an Airport Layout Plan which sets forth, in both a narrative report and in a set of drawings, the facilities identified by the Master Plan that are required to meet long-term needs.

15. There are a number of FAA publications describing the process for evaluating airport needs and preparing Master Plans, and the FAA has supervised the preparation of airport master plans for major cities around the country. As an airport proprietor, the FAA has conducted similar analyses of its own for the airports serving the Washington, D.C. area. The publications published by the FAA on identifying airport needs, and evaluating alternatives include:

a. *Planning The Metropolitan Airport System,* FAA and Airport Operators Council International, AC 150/5070-5 (1970);

b. *Airport Master Plans,* AC 150/5070-6 (FAA 1971);

c. *Airfield and Airspace Capacity/Delay Policy Analysis,* FAA-APO-81-14 (FAA December 1981);

d. *Economic Analysis of Investment and Regulatory Decisions—A Guide,* FAA-APO-82-1 (FAA, January 1982).

16. In preparing the Final EIS for the O'Hare expansion project, the FAA regional office was certainly familiar with these documents and claims to have conducted its analysis of

needs and alternatives in accordance with the principles set forth therein.

### 1. Long-term Aircraft Operations Demand

17. Central to the determination of the need for expanded airport facilities at O'Hare is an analysis of demand and supply (capacity). FAA states the need for demand analysis as follows:

> . . . [T]he principal determinant of future airport system requirements is the amount of aeronautical activity that will be generated in the metropolitan area. Forecasts of aeronautical activity, therefore, form the basis for facilities planning for future requirements.
>
> *Planning The Metropolitan Airport System*, p. 34.

18. For airside facilities (e.g., runways and taxiways) at airports, demand is commonly defined in terms of numbers of aircraft operations expected to take place in a given time period. The FAA states that annual demand forecasts should be made for a twenty year period.

> The long-range time period for the plan should generally be twenty years . . . .
>
> *Planning The Metropolitan Airport System*, p. 15.

> Annual forecasts of airport traffic (for 5-, 10-, and 20-year periods) form the principal basis for future airport facility requirement planning.
>
> *Planning The Metropolitan Airport System*, p. 38.

### 2. Capacity Analysis

19. Once the demand for aircraft operations for the metropolitan area is forecast, the next step involves comparing

27. The Federal Aviation Administration has illustrated the distinction between physical capacity and practical capacity in Exhibit 1, and elaborates on the distinction between the two capacity concepts as follows:

> Two principal definitions of capacity have been advanced in discussions of terminal area capacity: (1) a so-called "practical" measure, and (2) a "throughput" measure.
>
> *Airfield and Airspace Capacity/Delay Policy Analysis* (FAA December 1981), p. 9.

> The two measures are illustrated by Figure 1 which indicates the theoretical relationship between capacity and delay. As can be seen, the "thoughput" measure is the maximum capacity attainable. It results in very high average delay levels—infinite at the limit—as a consequence of the unevenness of arrivals. The "practical" measure is less than the "throughput" measure. It is that level of capacity utilization which corresponds to a given acceptable level of delay.
>
> *Airfield and Airspace Capacity/Delay Policy Analysis* (FAA December 1981), p. 10. (See Exhibit 1 attached to my affidavit).

28. The amount of delay experienced by airport users is obviously an important determinant of both physical and practical airport capacity, since rapidly increasing delays result in congestion costs that deter use. All other things being equal, measures taken to reduce delays therefore necessarily increase both the physical and practical capacity of an airport.

29. Aircraft delays can be reduced—and airport capacity increased—by reducing the average processing time per aircraft operation. Structural means of accomplishing this include the addition of new runways and taxiways. Non-structural means

involve changing the rules governing airport operations, such as reducing the required distances (separation) between consecutive landing aircraft. Both types of capacity enhancements reduce the average processing time per aircraft and therefore reduce aircraft delays. Both increase the physical and practical capacity of the airport.

30. As explained below, sometime prior to preparation of the Draft EIS, Chicago apparently changed—and the FAA apparently accepted in the Final EIS—aircraft processing times; and therefore, both the practical and the physical capacity of O'Hare airport. Neither the data nor the calculations leading to these changes have been disclosed. These changes can have major consequences for the analysis both of alternatives and of environmental impacts.

31. The related concepts of air traffic operations demand and the capacity of the existing airfield to accommodate the traffic are the critical elements in identifying the need for added airport facilities, in examining alternatives, and in quantifying environmental impacts.

### 3. The Role of Long-Term Demand Forecast and Capacity/Delay Analysis in Identifying Environmental Impacts

32. The demand forecasts and the related capacity/delay analysis form the core of the environmental impact analysis for both noise and air pollution. According to Chicago, the key element of information for calculations of noise impact is the number of aircraft operations forecast for O'Hare. The number of aircraft operations input to the noise calculation depends on the demand forecast for the metropolitan area, the split of that demand, and the capacity/delay analysis for the airfield. None of these calculations have been disclosed.

33. Similarly, key inputs in the air pollution impact analysis are the projected number of operations and delays per aircraft developed in the capacity analysis. All other things

(2) building a new airport.

f. The FAA also recommends analyzing alternative means of reducing airfield operations demand by:

(1) transferring some of the operations demand to other hub airports;

(2) applying various administrative and economic controls;

(3) substituting other transportation modes to satisfy the demand for travel from which aircraft operations demand is derived.

43. It is important to emphasize that the alternatives identified do not need to operate in isolation. Different alternatives can be used in combination in order to balance airfield capacity and forecast demand. The combination selected can involve varying degrees of capacity expansion and demand moderation including, of course, greater use of other airports, or a new airport.

44. As noted above, the FAA has emphasized the importance of withholding capacity expansion decisions at an existing airport until the allocation (split) of operations demand has been made based on the combination of alternatives that has been selected.

> . . . [I]f a new air carrier airport is needed, a new split in airline operations will result and a shift of substantial numbers of operations to the new airport may *preclude the requirement for extensive expansion at the existing airport.*
>
> *Planning The Metropolitan Airport System*, p. 53 (emphasis added).

### 5. Selecting the Preferred Alternative by Benefit/Cost Analysis

45. Once the various alternatives have been identified, it is necessary to determine the combination that meets the forecast

aircraft operations demand in the most desirable manner. Both the FAA and Chicago use a ranking process based on the economic benefits and costs of the various alternative combinations as well as on the expected environmental impacts.

46. The FAA has published a manual which sets forth the recommended procedures for calculating the economic benefits and costs of various alternatives. *Economic Analysis of Investment and Regulatory Decision—A Guide,* (FAA January 1982).

47. Of particular significance to this case are the FAA's definitions of the benefits and the costs which must be included in the evaluation process. As to costs, the FAA states:

> Each alternative method of accomplishing the objective will have its own associated cost. Costs include all capital, labor, and natural resources required to undertake each alternative whether they are borne by FAA, other governmental units, various components of the total flying public, the general public, or some other particular group. Inclusion of costs borne by all groups is required in order to measure the total value of what must be foregone to undertake each alternative and to avoid errors in answering the economic questions.
>
> *Economic Analysis of Investment and Regulatory Decision—A Guide,* p. 4-1.

48. Obviously included in the costs which must be examined in any expansion alternative is the economic injury to property caused by increased noise.

> The provision of air transportation services generates noise which imposes costs or disbenefits on those who are subjected to this noise.
>
> *Economic Analysis of Investment and Regulatory Decision—A Guide,* p. 3-26.

49. The FAA has explicity acknowledged the economic cost of noise damage in its study of noise curfews at Washington National Airport. In the same study, the FAA recognized that if an alternative results in decreased noise, a beneficial impact should be registered on the benefit side of the benefit/cost calculation.

> The impact of a change in the general level of aircraft noise may be quantified through the estimated change it causes in residential property values. . . . [a] change of one decibel (above the 65 dB level) is estimated to result in a 1.5 percent change in property values in the opposite direction of the noise change.
>
> *Final Regulatory Evaluation: Metropolitan Washington Airports Policy,* (FAA 1981), p. 43.

> Fewer operations may lower the noise exposure of area residents.. It has been demonstrated that noise reductions increase the sales value of residential properties, all other things being equal. Thus, one potential benefit of reduced operations is increased property values.
>
> *Final Regulatory Evaluation: Metropolitan Washington Airports Policy,* (FAA 1981), pp. 8-9.

50. There is another cost related to expansion of operations which the FAA states should be included in the benefit/cost comparison of alternatives—the cost of delay to the airlines and to the air traveler. Increasing operations without increasing the runway capacity of existing airports inevitably results in an increase in the delays experienced by aircraft and therefore passengers using the airfield. FAA has estimated that the average cost per passenger per hour for each hour of delay is $17.50. *Final Regulatory Evaluation: Metropolitan Washington Airports Policy,* (FAA 1981), p.45.

51. Once the economic and environmental benefits and costs of the various alternatives, or combinations thereof, are calculated, one of the alternatives or combinations is selected. The FAA describes the process as follows:

> The benefits of each alternative are then valued in dollars and compared to their expected costs. That alternative for which benefits exceed costs by the greatest amount is identified as the project alternative to be undertaken. The action is worth taking because benefits exceed costs. It is best because benefits exceed costs by the greatest amount.
>
> *Economic Analysis of Investment and Regulatory Decision—A Guide, pp. 2-4.*

## C. A DESCRIPTION OF CHICAGO'S ACTIONS IN SELECTING THE PROPOSED EXPANSION PROJECT

### 1. Chicago's Master Plan

52. The steps taken by Chicago to reach its decision to expand O'Hare field are never clearly set out in the Final EIS. Nevertheless, by examining the EIS and the City's "Master Plan" (described below), it is possible to partially retrace Chicago's steps. However, neither Chicago nor the FAA has disclosed major elements of the data and analysis performed by Chicago and the FAA at several critical junctions.

53. The process followed by Chicago was called a "Master Plan" for planning and selecting needed airport facilities. Chicago's Master Plan purported to follow the procedures and requirements established by the FAA for selecting projects to meet projected air traffic demand over a 20-year period. (See *Airport Master Plans,* AC 150/5070-6 (FAA 1971); *Planning The Metropolitan Airport System,* FAA and Airport Operators Council International (1970) and discussion above.)

demand of 1.4 million operations), but a cap on operations would be imposed. Chicago stated:

> . . . [T]he O'Hare demand growth was assumed *to be curtailed* between 1985 and 1995, eliminating the need for the extensive development of the unconstrained case [i.e., 2 new runways].
>
> p. IV-9, Master Plan, Volume VII (emphasis added).

67. Nowhere is there any discussion of how this cap, (or "curtailment" or constraint) was going to be imposed, but the cap selected by Chicago was 950,900 operations. This 950,900 operations cap apparently represents what Chicago claimed was the "physical" capacity of O'Hare. This 950,900 operations limit explicity assumes that hub demand is still 1.4 million operations in 1995 but that other alternative airports can be used to accommodate the shortfall between the hub demand of 1.4 million and the 950,900 limit. Explicit in this cap is the recognition that interconnect passenger traffic can be accepted at other airports (see discussion below).

68. Chicago also acknowledged the need for alternatives to meet levels of aircraft operations demand short of the cap on operations based on the "physical" capacity of O'Hare. As explained above, as the number of aircraft operations approaches the rated "physical" capacity of the airfield, delays rise exponentially. This results in tremendous delay costs to the traveling public and congestion related pollution problems as well.

69. Chicago acknowledged that if traffic demand were allowed to grow to the limits of the physical capacity of O'Hare, the resulting delays to air traffic would be intolerable. The only alternative for avoiding these intolerable delays, according to Chicago, was to cap operations at a level where delays were tolerable—and to send the remaining 20-year demand to other airports—or to build two new runways to reduce delays.

### (iii) A New Carrier Airport

70. Even though both Chicago and the FAA acknowledged the feasibility of sending traffic to other airports, Chicago explicitly stated that a new air carrier airport to accommodate air traffic demand would be needed by the year 2000.

> If connections are off-loaded from O'Hare [this is the cap on operations of 950,900 at O'Hare with use of other hub airports] and Midway is used in an air carrier role (Alternatives 3 and 5) [Midway runways expanded], a reduced level of O'Hare development [no new runways 950,900 operation] is required to meet the 1995 origin and destination passenger needs, but *another major airport will be required* to accommodate the remainder of the unconstrained growth thereafter.
>
> p. V-1, Master Plan, volume XI (emphasis added).

71. Note that there is no reason why the major portions of the forecast traffic could not be permanently allocated to other hub airports in other cities. Chicago however, appears to view the use of other hub airports as a "stopgap measure" pending either the construction of a new airport or construction of two new runways at O'Hare.

72. Without a new airport, Chicago stated that the only way to accommodate the traffic would be to build two new runways. Again, neither a new airport, nor two new runways, nor the use of other airport hubs are analyzed in the Final EIS.

### e. Selection of the Preferred Alternative by Cost/Benefit Analysis

73. Chicago then did a benefit/cost analysis on only two of the three options: 1) the two new runways at O'Hare (alternatives 0-3 listed at p. 24 of the Final EIS); and 2) capping operations at O'Hare and sending the air traffic to other airports (alternatives 4 and 5 listed at p. 24 of the Final EIS).

74. No mention is made in the Final EIS that these numbered alternatives involved either building two new runways or sending some of the air traffic demand to other airports.

75. Chicago did not investigate the economic feasibility of a new air carrier airport (i.e. perform a cost/benefit analysis) even though it was explicitly acknowledged that a third air carrier airport would be needed to accommodate some of the forecast future aircraft demand if two new runways were not constructed at O'Hare. (see paragraph 70 above).

76. Based on this cost/benefit analysis Chicago purported to select the alternative which capped operations at O'Hare and transferred air traffic demand to airports in other cities. Operations at both O'Hare and Midway would be permitted to expand to match their respective physical capacities, and the residual, unsatisfied hub demand transferred to airports in other cities.

> On the basis of benefit/cost relationships, coupled with the high level of community concern for airport noise, the attendant social costs and the questionable ability to implement plans requiring new runways, a city policy decision was made to proceed with planning based upon the role identified as Alternative 4 (constrained development with 120-130 domestic gates) utilizing the existing O'Hare runway configuration. . . . [I]t was decided to use Midway to serve part of the scheduled commercial carrier activity, in selected short-haul markets, that *would have to be diverted from O'Hare.* Thus, Alternative 2 was selected for Midway [no expansion but air carrier for 29% of short haul traffic], effectively postponing the time when *new aviation facilities* will be needed to serve the balance of the Chicago area demand.
>
> p. V-6, Master Plan, Volume XI (emphasis added).

77. The City acknowledges that some of the 1995 hub demand will be sent to other hubs:

> The selection of the constrained role for O'Hare and an Alternative 2 level of development for Midway will not fully accommodate the forecast level of demand for the Chicago Metropolitan Area in the planning time period.
>
> * * *
>
> . . . [I]t can be assumed that this unsatisfied demand will . . . be diverted to other air carrier connecting hubs such as St. Louis, Kansas City and/or Dallas/Fort Worth.
>
> pp. V-6 and V-7, Master Plan, Volume XI.

As discussed above, Chicago apparently considers the use of other airports a "stopgap" alternative and that the only alternatives within the 20-year time frame of the Master Plan are either new runways at O'Hare or a new airport.

### 2. The Chicago Draft EIS and the FAA Final EIS

78. Having selected the alternative project which capped operations at O'Hare at the asserted physical capacity of the airport and which addressed the issue of the remaining unsatisfied demand by using other airports, Chicago then prepared a Draft EIS for the selected Master Plan project. (Volume XVI of the Master Plan).

#### a. Use of New Undisclosed 20-Year Metropolitan Aircraft Operations Demand

79. In that draft EIS (Volume XVI of the Master Plan) Chicago used a completely new forecast for aircraft operations for O'Hare.

80. The Chicago metropolitan area 20-year aircraft operations demand forecast, which includes these new O'Hare

demand figures, has never been disclosed. Nor have the data and calculations underlying the new metropolitan aircraft operations demand ever been disclosed. Without such disclosure, it is impossible to evaluate the economic and environmental impacts of the proposed project. Yet the FAA in its Final EIS has adopted and used portions of this undisclosed metropolitan 20-year demand without disclosing the data, calculations and methodology for the 20-year forecast or the forecast itself or the traffic split used for the analysis.

81. From the information that is available, it appears that Chicago has simply shifted about five years into the future the aircraft operations hub demand listed in the Master Plan. If that is the case, all the impacts and alternatives discussed in the Master Plan, including the need for either a new air carrier airport, two new runways or use of other airports, will necessarily occur.

82. Based on what is known about the undisclosed revised 20-year hub demand, there is no question that the unconstrained operations demand for O'Hare will exceed by many thousands the 920,600 operations demand listed in the Final EIS. The environmental effects of those operations in excess of 920,600 are not even mentioned, let alone analyzed in the Final EIS.

**b. Use of New Undisclosed Capacity/Delay Analysis**

83. Similarly, Chicago published new capacity/delay claims for O'Hare in the Draft EIS. Again, neither the basic data, the assumptions, the worksheets, nor the methodology for the new capacity/delay analysis is contained in either the City's Draft EIS or the Final EIS. From the limited information that is available, however, it is clear that Chicago made dramatic changes in either the simulation model or the data used to

calculate aircraft delays; the delays for various levels of aircraft operations are markedly lower than those published earlier in Chicago's Master Plan.

84. The consequences of such unexplained delay reductions are straightforward. At the same level of airfield operations, a reduction in the delay per aircraft operation can only occur as a result of increasing airfield capacity. Neither Chicago nor the FAA has published a revised annual capacity analysis for O'Hare. However, given the dramatic unexplained reduction in delays per aircraft operation appearing in Chicago's Draft EIS, it can be safely assumed that O'Hare's physical capacity is now rated by Chicago and the FAA at greater than the 950,900 operations which was stated in the Master Plan. If that is the case, the number of operations that can be physically processed at O'Hare is greater than 950,900 and the assumed "worst case" condition used in the Final EIS understates the environmental impact of the project.

85. These two figures—hub demand and capacity of the O'Hare airfield— are the key determining factors, not only for project sizing and evaluation of alternatives, but also for environmental impacts of the proposed project and any alternatives. The forecast demand and field capacity/delay data are key inputs into both the noise impact calculations and the air pollution consequences.

86. If the demand for aircraft operations at O'Hare is greater than 920,600 operations and the physical capacity of the airport is greater than 950,900 operations, such assumptions being consistent with the Final EIS, the worst case analysis should be based on:

a. the number of aircraft operations that will be demanding use of the O'Hare field over the 20-year period; and

b. the physical capacity of the field.

54. The final product of the Master Plan is a set of drawings and a narrative report called an "Airport Layout Plan" which shows the facilities which the planning agency says are necessary to meet the forecast demand. Approval of the Airport Layout Plan by the FAA is required before construction can begin on the facilities contained in the plan.

55. Chicago's decision to build the expansion project and the FAA's analysis of the project are predicted on simple principles of demand and supply. Chicago purported to follow the same steps prescribed by the FAA for master plan evaluation of long-term airport facility needs.

### a. 20-Year Forecast of Aircraft Operation Demand for Chicago Metropolitan Air Carrier Airports

56. First, Chicago purported to identify the long-term (20-year) aircraft operations demand in the Chicago metropolitan area. As noted above the calculation of what is called "hub demand" is critical to all later economic and environmental analyses.

57. The only 20-year hub aircraft operations demand figure published by Chicago is found in Volume III of the Master Plan. All project alternatives—including the one the Final EIS states is the project selected by Chicago—are based on this hub forecast. However, as described below, Chicago now says it has changed the 20-year hub forecast. Neither Chicago nor the FAA has revealed this new 20-year hub forecast.

58. The hub aircraft operations forecast used by Chicago to select the project described in the Final EIS is 1,412,000 aircraft operations for the two Chicago air carrier airports in 1995. (See Master Plan Volume III, *Aviation Demand Forecast*, Table 6.)

**b. Traffic Split of the Metropolitan Aircraft Operations Forecast Demand Between O'Hare and Midway**

59. As described above, the next step in the FAA Master Plan Process is allocating the forecast traffic between the existing metropolitan air carrier airports. This allocation of demand is done before the capacity of the existing airports to accept the traffic is calculated. Chicago split the hub demand between O'Hare and Midway based on four different assumptions about the use of Midway. Under these assumptions, O'Hare was allocated the preponderance of the forecast operations demand with the following options for the O'Hare/Midway relationship:

a. *Alternative traffic split 0* assumed that the traditional nal traffic split between Midway and O'Hare would continue. That traffic split allocated 1,140,300 operations to O'Hare in 1995.

b. *Alternative traffic split 1* was to close Midway and let O'Hare carry all the air carrier traffic. Under this alternative 1,207,200 operations were allocated to O'Hare in 1995.

c. *Alternative traffic split 2* was to keep Midway open without expanding its runways, and to accommodate a small amount of air carrier traffic at Midway. This alternative allocated 1,134,800 operations of the hub demand to O'Hare in 1995.

d. *Alternative traffic split 3* was to expand Midway's runways to accommodate longer range aircraft operations. Under this alternative, 1,087,900 operations were allocated to O'Hare in 1995.

Source: pp. I-6, I-7 and IV-4, Master Plan, Volume VII.

60. Under all four of the alternative traffic splits, in excess of one million aircraft operations were allocated to O'Hare in 1995.

### c. Capacity Analysis

61. Chicago then calculated the currently available airfield capacity at O'Hare and Midway to accommodate the projected demand. This capacity analysis is also critical to the selection of the options by Chicago, and to an evaluation of the environmental impacts. (As discussed below, the current "capacity" calculations used by Chicago and the FAA for O'Hare field are missing from the Final EIS and cannot be found in any Master Plan documents.)

62. Chicago determined that the "capacity" of O'Hare and Midway was inadequate to meet the forecast traffic demand. Chicago's conclusion here is very significant to the entire economic and environmental evaluation of its expansion project.

> As can be seen in the exhibit [Exhibit III-2], the pattern of delay appears to be exponential, and undergoes a very rapid change in the rate of increase of delay between 1985 and 1995. The proper conclusion to be reached from the exhibit is that the system would begin to deteriorate very rapidly between 1985 and 1995; and that delay and congestion conditions would become increasingly intolerable after 1985. At some point during that time frame, it would become necessary to either *curtail traffic* or to begin to rely heavily on the *addition of new facilities.*
>
> P. III-17 Master Plan, Volume VII (emphasis added).

### d. Alternatives Identification

63. Having determined that forecast 20-year demand for aircraft operations would overwhelm Chicago's airports, and particularly O'Hare, Chicago then identified alternatives to accommodate the 1.4 million operations forecast demand.

64. The alternatives identified by Chicago were:

a. two new runways at O'Hare;

b. limiting (capping) operations at O'Hare and transferring the air traffic demand to other existing airports; and

c. a new air carrier airport.

Included with each of these three alternatives was the possibility of some expansion of runways at Midway.

**(i) Two New Runways**

65. The first of these alternatives was the building of two new runways at O'Hare:

> From the analysis described in this chapter, it was concluded that *additional runways will be necessary at O'Hare between 1985 and 1995 if the full potential demand is to be serviced.*
>
> p. III-18, Master Plan, Volume VII (emphasis in original).

> Unconstrained development [two new runways] of O'Hare will be necessary to accommodate forecast unconstrained 1995 Chicago area aviation demand (Alternatives 0, 1 and 2) and provide existing airport system growth *beyond the year 2000.*
>
> p. V-1, Master Plan, Volume XI (emphasis added).

**(ii) Cap on O'Hare Operations With Use of Other Airports**

66. The second alternative was capping operations at O'Hare and sending the excess demand traffic to other airports. As described above, Chicago had concluded that without a cap on operations the allocated hub demand would create such chaotic delays that the system would break down and new runways would be needed. The City thus decided to examine the impacts of putting a cap on operations at O'Hare. The demand for services would still be present (i.e., the hub

Both the Chicago Draft EIS and the FAA Final EIS fail to give either the 20-year demand or the current rated annual operations physical capacity of the airfield. Nor does either document provide any of the data and analysis underlying such calculations.

87. In its Draft EIS, Chicago also made some claims as to the level of operations where "intolerable" delays would occur and which would serve as a cap on operations short of the physical capacity of the airport. As explained above, a capacity based on the tolerable level of delays is called the "practical capacity" of the airfield. This concept of practical capacity based on delays assumes that the economic cost of the delays reaches a level where interconnect travelers are no longer willing to use O'Hare.

88. Though the concept of practical capacity of the airfield is expressed in the City's Draft EIS and claimed to be 840,960 operations per year, no data or analysis is given to support the claims. Essential to a determination of such practical capacity would be a calculation of the costs of the delay to airport users. There is no evidence in either the Chicago Draft EIS or the final EIS that such costs were calculated.

89. If one accepts the definition used by Chicago in its Draft EIS (see p. I.6-4 of the Draft EIS) that the practical capacity of the airfield is reached at approximately 10 minutes delay per aircraft (for which no data or analysis is given), at least two major consequences occur, neither of which is addressed in either the Chicago Draft EIS or the Final EIS.

90. First, based on the limited information available in the Chicago Master Plan, the airfield will likely reach delay levels of 10 minutes per aircraft at levels below 840,960 operations. This means that under the so-called "do nothing" alternative analysis the level of operations will be less than 840,960 and the environmental effects will be less than claimed in the Final EIS. The environmental effects of the "do nothing" alternative in the Final EIS were predicated on 840,960 operations.

91. Second, claiming that the practical capacity of the existing airfield is 840,960 operations has major implications for the selection of alternatives. Based on Chicago's claims, O'Hare annual operations demand (an unknown split of the 20-year hub demand) in ten years will be 920,600. In fifteen and twenty years—the scope of the long-term demand forecast—the demand will be presumedly even higher. Based on Chicago's own analysis in its Master Plan, the only alternatives for accommodating this excess demand will be: a) use of other hub airports; b) construction of a new air carrier airport in the Chicago area; or c) the construction of two new runways at O'Hare.

92. By Chicago's own acknowledgement, the delays will mount to a level where the the inevitable consequence will be to move traffic elsewhere or build new runways. Absent a conscious effort to implement either the use of other hubs or construction of a new air carrier airport, the only currently technically feasible alternative identified by Chicago to accommodate the forecast demand is the construction of additional runways.

93. There is no discussion of any of these inevitable alternatives in the Final EIS: no analysis of capping operations, no analysis of use of other hubs, no analysis of building added runways. Under the analysis performed by Chicago in its Master Plan, one or a combination of these alternatives must be used to accommodate the forecast demand.

## C. CONCLUSIONS

94. My analysis of the Final EIS and the Chicago Master Plan—which purportedly defines the project on which the Final EIS is based—is set forth above. My conclusions based on this analysis are as follows.

### 1. Failure to Disclose

95. The Final EIS fails to identify, disclose, and include several key analyses essential to quantification of the economic need for and environmental impacts (including noise and air pollution), of the expansion project and essential to the identification of necessary alternatives.

96. The key unanswered questions are: How many aircraft operations are forecast in the twenty year time frame, and what is the capacity of the existing O'Hare and Midway Airports to handle this traffic? The entire justification for the project is based on the answers to these two questions. The requisite data and analyses are missing from the Final EIS even though this damand and capacity analyses provide the purported basis for selection of the expansion project, the purported basis for quantification of environmental impacts, and the rejection of suggested alternatives.

97. Nowhere is the reader told of the use of air traffic demand and capacity analysis by the City and the FAA to indentify alternatives, select the project, and predict environmental impacts. Nowhere is the reader told what the 20-year traffic operations demand is for the Chicago Metropolitan area and the split allocated to O'Hare. What is the current FAA and Chicago forecast of the metropolitan aircraft demand and the share allocated to O'Hare?

98. Nowhere in the Final EIS are the physical throughput capacity and the practical capacity of O'Hare revealed. Nowhere are the calculations and methodology underlying these calculations disclosed in the Final EIS. What is the FAA's and Chicago's current claim as to the practical and physical capacity of O'Hare, and what is the basis for that claim?

99. Nowhere does the FAA disclose that Chicago's 20-year demand forecast is greater than O'Hare's and Midway's capacity, and that the alternatives identified by Chicago in its Master Plan were: a) two new runways at O'Hare; b) a new

airport in the Chicago area; or, c) capping operations at O'Hare and sending the excess demand to other airports.

100. Nowhere does the Final EIS disclose that Chicago selected the alternative of capping O'Hare operations and sending traffic to other airports. Nowhere does the FAA disclose that because Chicago considers this alternative a stop gap measure that the only alternatives within the 20-year time frame of this project are either two new runways at O'Hare or a new airport.

101. Without this missing information, it is impossible for citizens, independent experts, or the Judiciary to understand and evaluate the economic and environmental impacts of the expansion proposal or the feasibility of any alternatives. Without such information, neither the FAA, the public nor this Court can determine how much noise or air pollution will exist with or without the project, or determine which alternatives are feasible.

### 2. The Final EIS Identifies the Wrong Project and in Doing so Rejects as not Feasible an Alternative Actually Selected by the City —the Use of Other Airports

102. As described above, the option selected by Chicago to meet the 20-year forecast aircraft operations demand was as follows:

1. cap O'Hare at 950,900 operations annually, a level of traffic indicated to be the throughput capacity calculated by Chicago;

2. send traffic in excess of this level which could not be handled by O'Hare to airports in other cities, a procedure explicitly recognized as an alternative by Chicago.

3. use Midway to its existing capacity without runway expansion.

103. Contrary to the project actually selected by Chicago, which uses other airports in conjunction with a cap on O'Hare to accommodate 20-year air traffic operations demand, the Final EIS rejects the use of other airports as an alternative. Nowhere in the Final EIS is there any discussion or analysis of the use of other hub airports even though that is the alternative selected by Chicago and even though the FAA elsewhere has identified the use of other hubs as a feasible alternative for accommodating excess demand. As described above, other hub airports could be used in conjunction with various levels of operation at O'Hare.

### 3. The Final EIS Ignores Other Alternatives for Addressing the Forecast Traffic Demand

104. The Final EIS fails to identify and examine alternatives proposed elsewhere by the FAA itself to address the needs of hub airports such as O'Hare. These alternatives include capping operations at a level below the forecast demand and the use of administrative quotas, congestion charges and other non-structural means for reducing demand. (See discussion above).

105. These restrictions on operations can be imposed: a) in recognition of the limits of the physical capacity of the airport; b) because delays are too great at the forecast levels of operations; or, c) to reduce the adverse environmental impact of aircraft operations. An example of such a restriction on operations can be found at Washington National Airport in Washington, D.C. where the FAA has imposed both daytime quotas as well as a nighttime limit on operations.

### 4. The Project Selected by Chicago and Approved by the FAA was Based on a Missing and Flawed Benefit/Cost Analysis

106. The project selected by Chicago was based on a benefit/cost analysis not contained in the Final EIS. The benefit/cost analysis is found instead in the City's FAA funded and approved Master Plan.

107. An examination of that benefit/cost analysis discloses that neither the FAA nor the City included either the costs which will be created by the project, or the cost savings which could be produced by alternative projects. These costs include losses in property values caused by aircraft noise, and losses to passengers caused by the congestion and delay that will result from the project. These costs are included by the FAA in the FAA's analysis of other projects such as its own master planning project for the Washington, D.C. area airports.

108. In respect to the Chicago area, these project costs that are ignored would likely amount to hundreds of millions of dollars. Had these costs been included in Chicago's benefit/cost analysis, another alternative involving less noise and less delay might have been selected.

109. Beyond the failure to included relevant costs, the benefit/cost analysis includes claimed economic benefits which are improperly counted. Under standard economic practice, and followed by the FAA, benefits such as jobs and sales are considered indirect benefits which would accrue regardless of where the demand is met. The only direct benefits properly includable in a calculation of benefits are actual cost savings which would not accrue but for the project.

### 5. The Final EIS Fails to Examine the Alternative of Another Air Carrier Airport

110. Apart from ignoring the use of other *existing* hub airports (which FAA has elsewhere stated is a feasible alternative and which Chicago asserts it has used), the Final EIS fails to conduct any detailed analysis of the alternative of building a new air carrier airport.

111. Yet in the City of Chicago's Master Plan, a new air carrier airport was identified as being necessary to carry the forecast long-term air carrier demand beyond the year 2000, which is within the 20-year planning period specified by the

FAA for meeting long-term needs. The Final EIS never discusses the City's conclusion that a new airport will be needed and summarily rejects this alternative.

112. I have examined both the Final EIS and the Master Plan of the City of Chicago. In these documents I find no statement of the locational siting criteria for a new airport (i.e., where such an airport would have to be to serve Chicago metropolitan traffic), no evidence supporting the adoption of such siting criteria, no evidence of any search for a site which meets the adopted siting criteria, and no quantification of the costs involved in construction of another air carrier facility.

113. Despite this complete lack of investigation, the Final EIS rejects an alternative Chicago has stated it needs, because "development costs . . . would be extreme"; "the lead time required to plan, design and construct the new airport would . . . place its operational startup date beyond the year 2000" and "no site large enough and close enough to the City that is both acquirable at a reasonable cost and environmentally acceptable has yet been identified." (Final EIS, p. 22).

114. At no time does the FAA define the quantitative criteria for a site being "large enough" (how many acres); "close enough" (how many miles from where and why?). At no time does the Final EIS state what is a "reasonable cost" and at no time does the Final EIS define what is "environmentally acceptable." Without quantification of such criteria, the reasoning behind such criteria, and the explicit evidence of application of such criteria to the situation in the Chicago metropolitan area, it is professionally and technically improper and unreasonable to summarily reject this alternative.

115. The FAA and Chicago should have conducted a thorough investigation of this alternative and ranked the benefits and costs of the alternative along with the other alternatives contained in the benefit/cost analysis used by Chicago and the FAA. This failure becomes particularly egregious when the

FAA has explicitly stated elsewhere that new air carrier airports should be examined as alternatives where, as in Chicago, the 20-year demand forecast exceeds the capacity of the existing airport facilities. Further, the FAA has also stated elsewhere that new air carrier facilities should be examined as an alternative to relieve congestion and delay by removing some of the existing demand from congested hubs. There is simply no empirical justification presented in the Final EIS or the Master Plan for rejection of the alternative of a new air carrier airport.

116. This summary rejection is also irrational in light of Chicago's express acknowledgment that the only way to serve the forecast air traffic demand is with: a) a new airport; b) two new runways at O'Hare; or, c) moving the forecast traffic to other existing airports in other cities. By failing to explore a new airport now, the City is irrevocably restricting the alternatives to two new runways or sending the traffic to other cities. Since Chicago has openly announced its desire not to send the traffic demand to other cities (which the FAA has admitted elsewhere is a feasible alternative) Chicago's options are limited to building additional runways at O'Hare. Failure to pursue the alternative of a new air carrier facility now will make it much more difficult to address this alternative ten to fifteen years from now. At that time land will be less available and the loss of lead time to design and construct such a facility will make it much less attractive than short-term construction of additional runways at O'Hare.

### 6. The Final EIS Fails to Address the Economic and Environmental Consequences of Meeting the Forecast Air Traffic Demand

117. Neither Chicago nor the FAA have disclosed the 20-year hub demand forecast which is the key point from which the Master Plan and Final EIS base all their claims of need, project justification and environmental impacts. Based on the limited information available, the forecast demand will exceed the capacity of the existing O'Hare and Midway facilities.

118. As described above, the City in its Master Plan only identified three alternatives for meeting this forecast long-term demand: a) two new runways at O'Hare; b) a new air carrier airport in Chicago; or, c) transferring the traffic to other hubs in other cities. If a new air carrier airport is rejected as a feasible alternative and transfer of the traffic to other existing hub airports is rejected as a feasible alternative, the only alternative left by the FAA and City analysis is the construction of two new runways. By Chicago's own admission, traffic demand will far exceed the capacity of the existing airfield. Moreover, as air traffic growth approaches the physical capacity of the airfield, the delays will become so enormous, that new runways will be the only alternative left to pursue.

119. By rejecting the alternatives of a new air carrier facility, Chicago and the FAA have preordained the construction of new runways at O'Hare. Indeed, it is virtually impossible for Chicago to obtain the benefits claimed for the expansion in the benefit/cost analysis without building two new runways at O'Hare.

FURTHER AFFIANT SAYETH NOT.

/s/ JOSEPH L. CARROLL
Joseph L. Carroll

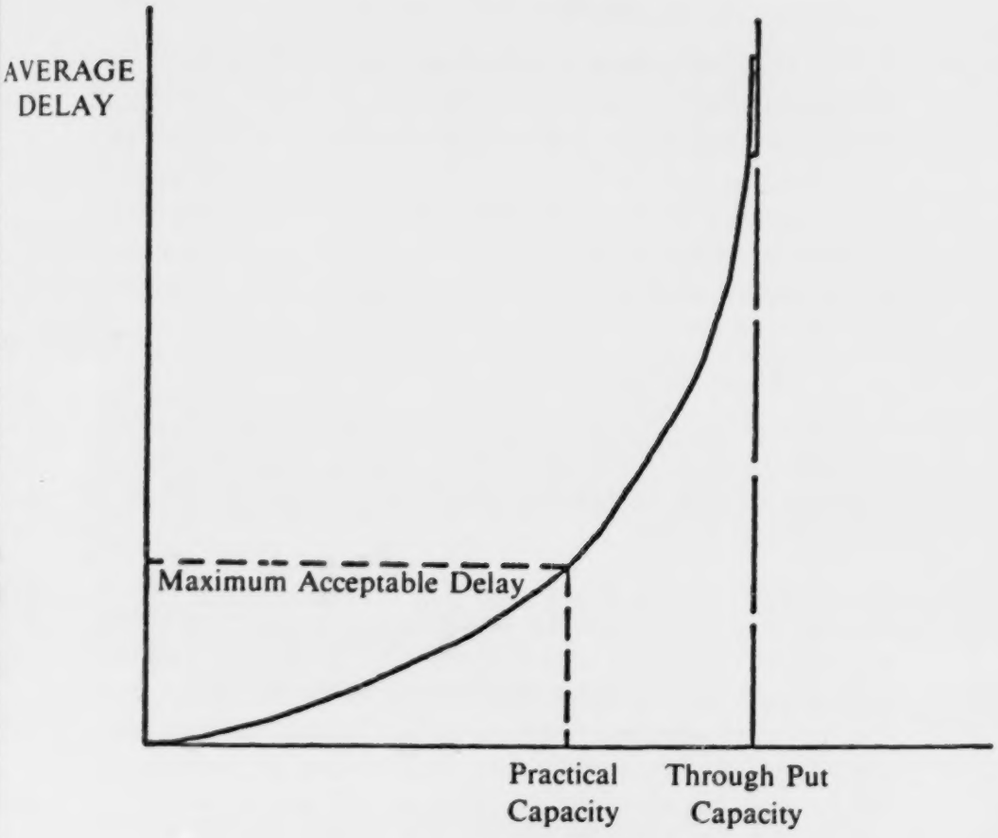
SUBSCRIBED AND SWORN TO
before me this 26th day of November,
1984.

BARBARA K. STONE
Notary Public
BARBARA K. STONE, NOTARY PUBLIC
STATE COLLEGE BORO. CENTRE COUNTY
MY COMMISSION EXPIRES JULY 11, 1988
State of Pennsylvania Association of Notaries



**FIGURE 1**

**RELATIONSHIP BETWEEN CAPACITY AND AVERAGE DELAY**




*Airfield and Airspace Capacity/ Delay Policy Analysis,* FAA-APO-81-14 (FAA, December 1981), p.11

EXHIBIT 1

## AFFIDAVIT OF RICHARD L. DE NEUFVILLE

Richard L. de Neufville, having been duly sworn, on oath deposes and states that:

1. My name is Richard L. de Neufville, and I reside in Cambridge, Massachusetts.

2. I presently serve as a Professor of Civil Engineering at the Massachusetts Institute of Technology (MIT) in Cambridge, Massachusetts. I also serve there as Chairman of the Technology and Policy Program, a graduate educational program preparing technically trained people for leadership roles in technical policy decisionmaking. I hold a Doctor of Philosophy as well as Master of Science and Bachelor of Science degrees from MIT.

3. While on leave of absence from MIT, I have held visiting professorships at the University of Califonia at Berkeley, the Ecole Centrale de Paris (France), and the London Graduate School of Business (England). I also served as a White House Fellow.

4. Both at MIT and for consulting clients, I specialize in the technical and economic analysis and strategic decisionmaking for large scale technological projects such as airports, marine ports and transportation terminals. In the terminology used in this field, this work is called systems analysis and planning.

5. My work has particularly emphasized airport systems analysis and planning, i.e., technical and economic analysis of airport needs, both locally and as part of an air transportation system, and the decisionmaking process which leads to selection of various airport development options. I have written three textbooks in this area: *Airport Systems Planning, Systems Analysis For Engineers and Managers,* and *System Planning and Design.*

6. Within this specialty, I have over many years studied the design and operation of air carrier airports in major metropolitan areas, and the roles of such airports within the larger national network of airline services. I have published numerous articles and reports on this subject in professional journals in the United States and overseas.

7. Because of my expertise and experience in this area, I have been asked to serve as a consultant on airport development planning and decisionmaking for numerous airlines and foreign airport development authorities in the United States and England, France, Mexico, and Australia.

**Object of this Affidavit**

8. I have been asked to review and comment on the *Final Environmental Impact Statement, Chicago O'Hare International Airport,* (dated May 1984, hereinafter the FEIS), prepared by the U.S. Federal Aviation Administration (FAA). The FEIS discusses a proposal by the City of Chicago to expand O'Hare Airport.

9. My conclusion is that the FEIS is seriously inadequate for the following reasons:

A. The FEIS fails to disclose critical information. The entire justification of the expansion project—as well as the analysis of alternatives and environmental impacts—is based on two key analyses: a) the projected demand for aircraft operations at O'Hare; and, b) on the ability ("capacity") of the existing airfield at O'Hare to accommodate the projected traffic without unacceptable delays. The FEIS never discloses the data, the calculations, or the methodolgy used to develop the 20-year forecast aircraft operations which is the stated basis for the O'Hare demand forecast used in the FEIS. The FEIS never discloses the data, calculations or methodology used by the FAA for its

assumptions as to the capacity of the existing O'Hare airfield to accommodate the forecast traffic.

B. A key justification for the expansion is to serve existing and projected transfer passengers—passengers who use O'Hare only as a connecting point. These passengers are extremely sensitive to delays at any transfer hub and will choose other hubs if delays at O'Hare become unacceptable. Given the existing and projected levels of delay at O'Hare, the inescapable conclusion is that very little if any of the forecast transfer traffic will come to O'Hare—indeed Chicago may actually lose existing transfer traffic—unless additional runways are built to increase the capacity of the airfield and reduce the delays to tolerable levels. By constructing vastly enlarged terminal facilities on the basis of transfer traffic which will not materialize unless new runways are constructed, Chicago and the FAA are virtually guaranteeing the requirement for construction of new runways and foreclosing the examination of other options.

C. The FEIS fails to consider reasonable and feasible alternatives to expanding O'Hare Field to meet the forecast traffic demand. Indeed, the FEIS specifically rejects the major, realistic alternative that both national and international experience indicates is most likely, use of other airports.

10. To understand the inadequacy of the FEIS and my conclusions, it is first necessary to describe Chicago's role in the national airport system, particularly in relation to servicing the transfer passenger.

**Chicago in the National Airport System**

11. Chicago is a transfer hub for air traffic. This means that many air travelers only fly to Chicago as a means of changing planes for another destination. These transfer passen-

gers do not have much interest in Chicago itself, and could transfer at other cities.

12. The transfer role, is, and has been, most important to O'Hare. While absolutely precise figures on the percentage of transfer passengers are not possible to determine, several excellent estimates indicate that as recently as a few years ago, over half the passengers at O'Hare have been transfers. In round numbers, half of the air travelers at O'Hare are transfers and have, in this capacity, no particular interest in being in Chicago.

13. The future traffic at O'Hare depends very much on what transfer passengers choose to do. They are free to transfer at other airports and will do so if service is more convenient and reliable. This factor—the potential use of other hub airports by transfer passengers—is the fundamental issue not addressed by the FEIS. This factor is the reason the FAA and Chicago do not establish the need and feasibility for the specific size of the project proposed. Without a corresponding increase in runway capacity through the construction of additional runways, the forecast traffic used to justify the proposed terminal expansion will not materialize. The transfer passengers forecast will avoid Chicago and use other airports due to the dramatic increase in delays resulting from trying to pack the forecast demand into the existing runways. The inevitable result is that the transfer traffic will divert to other airports and there will be inevitable pressure on Chicago build new runways to reduce delay to remain attractive to the transfer traffic.

14. This relationship of the delays and the migration of transfer passengers to other hub airports to avoid the delay is the major factor not thought through by the FEIS. The amount of delay faced by the transfer passenger depends both on future demand and the capacity of the existing O'Hare runways to operate without unacceptable delays. The failure to examine either the delays to the transfer passenger or the adequacy of the existing airfield (runway) facilities to accommodate the

forecast traffic without significant increase in delay undermines the entire analysis in the FEIS. The FEIS thus fails to demonstrate either that the existing runways can handle the traffic adequately or that, absent runway expansion, there will be sufficient traffic to justify the proposed expansion at O'Hare.

15. The nub of the issue is that transfer passengers are footloose." They could equally well be served by other hubs; and will in fact migrate to these hubs if Chicago appears unattractive in ways that are important to transfer passengers.

16. The current reality is that many of the transfer passengers have been migrating from Chicago to other hubs in the Mid-West. A prime instance of this phenomenon is the transfer by American Airlines of many of its hubbing operations to the Dallas/Fort Worth Airport. Similarly many other airlines have been establishing hubs away from Chicago. For passenger traffic, TWA operates a hub at St. Louis; Eastern Airlines at Kansas City; Piedmont Airlines at Dayton; Continental Airlines at Houston. Even cargo airlines have established hubs elsewhere: Federal Express at Memphis; Emery at Dayton; United Parcel Service at Louisville.

17. The migration of transfer passengers to other cities has strong implications for Chicago. It is likely to continue. It is thus likely to counterbalance the growth of the other half of traffic at O'Hare, the traffic actually generated by or destined to metropolitan Chicago. The overall growth of traffic at O'Hare may thus be relatively small, as it in fact has been over the past decade.

18. A major influence on whether hub operations migrate from Chicago is the reliability of airline operations with regard to their schedule. People who fly to Chicago to catch another flight need to know that they will be on time for that flight. Transfer passengers are sensitive to delays. Transfer passengers will only remain at Chicago to the extent that delays are tolerable.

19. The problem for Chicago is that delays are already serious and, as the level of aircraft operations rise at O'Hare, are projected to increase very significantly. Delays increase very rapidly, exponentially in fact, as saturation occurs. Unless delays are controlled near the current level, transfer passengers are likely to migrate increasingly rapidly from Chicago to other airports in the system.

20. Yet the FEIS never analyzes this key relationship between the highly delay sensitive transfer passenger demand and the ability of the existing runway capacity at O'Hare to accommodate aircraft operations growth without unacceptable delay. This failure leads to my three conclusions concerning the inadequacy of the FEIS.

**The FEIS Fails to Disclose Critical Information as to Demand and Capacity**

22. The FEIS is woefully deficient in providing data or analysis on two critical areas necessary to determine the need for expansion and to identify alternative solutions: 1) forecast aircraft operations demand, and 2) the capacity of the existing airfield to accommodate the forecast traffic without intolerable delays. As described above, these two factors are closely interrelated. Forecast demand is in part controlled by the delays resulting from existing capacity limitations on the airfield. If the delay becomes too great the forecast demand will simply move to other transfer hubs where the delays are acceptable. Clearly, a full exploration of the forecast demand and the capacity/delay situation at O'Hare is essential to determine need, identify alternatives and to investigate the economic and environmental impacts of these alternatives.

23. As to forecast air traffic demand, the thick several hundred page FEIS appears to devote only three paragraphs to this issue (page 6), supplemented by three Exhibits in Appendix A. There may be additional paragraphs somewhere, but I

did not find them. Yet the FAA acknowledges that these "forecasts *form the basis* for assessing the environmental impact associated with the overall development program." FEIS, p. 6 (emphasis added). Indeed, these unsubtantiated demand figures govern the entire process of need determination, alternatives identification, and project selection.

24. Despite the significance of these demand figures, the method and data used to determine the future traffic at O'Hare is not available for inspection. The underlying raw data, methodology and calculations required for any meaningful evaluation of the need for the proposed project is simply unavailable.

25. Similarly, as to the capacity of the airfield and terminal facilities, the general need for expanded facilities is argued elsewhere in the FEIS in terms of crowded conditions. This is insufficient to demonstrate and identify either need for the proposed project or to justify a proposed solution. It may well be, indeed it is likely, that some action is desirable to overcome present problems of crowding, aggravated by the increased use of wide-bodied aircraft. But such a project might very well involve a much more modest role for O'Hare with far less physical development there, coupled with the use of a variety of non-O'Hare alternatives such as use of other airports. What kind of project is right cannot, however, be presently determined as the forecasts of future traffic demand are not substantiated and the airfield capacity of the existing O'Hare facilities is not analyzed in the FEIS. Indeed, the only mention of the critical delay per aircraft operation issue is buried at p. 167 in the comments.

26. The trend extrapolations presented in the three Exhibits in the Appendix do not establish future needs in terms of level of traffic. The presumption, absent adequate documentation to the contrary, must be that the trend extrapolations are, in fact, hardly pertinent to that actual future of O'Hare. This is

because the methods commonly used by the U.S. Federal Aviation Administration to project traffic are based on the assumption that growth in traffic will be "unconstrained." The reality, of course, is that O'Hare is constrained by many physical factors, notably by the number of runways. The reality is also that the growth of traffic is also constrained by market factors, in particular by the reluctance of transfer passengers to travel via O'Hare if lack of sufficient runways creates huge delays.

27. Without additional new major runways, the actual traffic at O'Hare in 1995 is likely to be considerably lower than that projected by Chicago and the FAA. The projected doubling of the passenger traffic implies very large increases in delays on landing and take off, and such delays would deter much of the transfer traffic that currently uses O'Hare.

28. It is to be stressed that there is no solid evidence that the capacity of the existing runways will accommodate the projected increases in operations without significant additional delays. The five Federal Actions stated to be "required to achieve the 1995 operational levels" (page i of summary) are highly speculative. One in particular, closer separation between aircraft, has been argued for years and appears to be no closer to adoption than when proposed in the 1960's.

29. The presumption for Chicago must be, absent any documentation in the FEIS on the subject, that the controlling factor on the capacity of the existing runways is indeed the separation between aircraft. This issue is hardly likely to be resolved by new technology in any foreseeable future: it is a straightforward matter of safety and risk to passengers.

**Chicago's Goal of Bringing Expanded Transfer Traffic Into O'Hare Will Require New Runways**

30. Chicago's and the FAA's decision to attempt to bring future transfer traffic into O'Hare while rejecting other alterna-

tives will lead to inevitable pressure to build new runways at O'Hare.

31. As any transfer passenger who currently uses O'Hare well knows, the delays at O'Hare are barely tolerable at current levels of aircraft operation on the existing runway system at O'Hare. As discussed above, these delays will rise exponentially as more aircraft operations try to use the existing runway capacity.

32. As discussed above, the primary means of putting more aircraft on the existing runways without increasing delays is based on theoretical reductions in the separation between aircraft. There is no current basis for concluding that such reduced separation requirements will be available at any given future time.

33. Consequently, the only way to put significant additional numbers of aircraft operations beyond current levels into O'Hare—without unacceptably increasing delays beyond barely tolerable current levels—is to build new runways.

34. Given the existing and projected levels of delay at O'Hare, the inescapable conclusion is that very little if any of the forecast traffic will come to O'Hare—above existing traffic levels—unless additional runways are built to increase the capacity of the airfield and reduce the delays to tolerable levels. By constructing vastly enlarged terminal facilities on the basis of transfer traffic which will not materialize unless new runways are constructed, Chicago and the FAA are virtually guaranteeing the construction of new runways and foreclosing the examination of other options.

**Failure to Consider Major Alternatives**

35. The major alternative, indeed possibly the most likely alternative was not considered by the FEIS. This is simply that

many air travelers now going elsewhere via Chicago will use other airports in the Mid-West. The utilization of other airports discussed by the FEIS specifically is limited to other airports "within the Chicago Metropolitan area" (page v of summary).

36. Transfer traffic, which has no particular reason for being in Chicago as opposed to some other transfer airport, could easily be served by hubbing operations at Milwaukee, Minneapolis, Detroit, St. Louis, Kansas City, Dallas/Fort Worth, Dayton, Denver, etc. Indeed, much of it is already served by these points. As these transfer airports develop further, as delays at Chicago mount, much of the traffic now at Chicago is likely to be distributed across the Mid-West.

37. The major physical alternative to the proposed project follows from the above: it is a smaller development of the terminal area, appropriate to the lesser traffic likely to be at Chicago when new runways are not built, with transfer traffic serviced by other transfer hubs. This alternative is not examined in the FEIS.

38. Another major alternative that is technically possible is to build new runways that would provide the capacity for landings required to keep delays down and to keep transfer passengers coming through Chicago. This possibility is also not examined by the FEIS.

39. A third alternative to accommodate the forecast demand could include construction of a new air carrier airport for the Chicago metropolitan area. Such an airport would not replace O'Hare, but would be used in conjunction with O'Hare to provide Chicago area service to the forecast demand.

40. Each of the three alternatives described above—use of other transfer hub airports, construction of new runways at O'Hare, or a new air carrier airport—are alternatives that could be used either alone or in combination to address the demand forecast by Chicago. And each of these alternatives either

alone or in combination would have different economic and environmental impacts.

41. None of these alternatives are given any detailed analysis in the FEIS. This failure is particularly egregious since the use of one or more of these alternatives is essential to accommodate the demand level forecast by Chicago and the FAA. Without new runways, the proposed terminal expansion at O'Hare does not make sense and the construction of the major terminal expansion makes the construction of these runways imperative. With the use of other airports or a new air carrier airport for Chicago, there would be no need for the very large terminal expansion proposed by Chicago nor any need for new runways.

FURTHER AFFIANT SAYETH NOT.

/s/ RICHARD L. DE NEUFVILLE
Richard L. De Neufville

SUBSCRIBED AND SWORN TO before me this 26th day of November, 1984.

VIRGINIA A. CRUZ
Notary Public

## AFFIDAVIT OF BARRY BATEMAN

Barry Bateman, having been duly sworn on oath, deposes and states that:

1. My name is Barry Bateman and I serve as Airport Director for Milwaukee's General Mitchell Field—a modern, underutilized airport located in southern Milwaukee County within convenient driving distance from Chicago's northern suburbs.

2. For the reasons described below, Milwaukee County, the operator of Mitchell Field, has been following Chicago O'Hare's Master Plan proposal to expand traffic at O'Hare with great interest.

3. It is a well known fact that with O'Hare's current runway complex and terminal layout, O'Hare suffers from congestion and delays at present levels of air carrier traffic. Yet O'Hare has announced plans to expand the terminal in order to accommodate forecast increased traffic at O'Hare. Moreover, O'Hare is purportedly trying to accommodate this increase in air carrier operations at O'Hare without any significant expansion of runway capacity.

4. It is also a well known fact in the air transportation business that if an airport operator tries to add significant numbers of aircraft operations onto already congested runways, the delays to passengers can grow exponentially. Significant additional runway capacity will not occur without either construction of new runways or installation of substantial air traffic control improvements resulting in reduced separation between aircraft. Pumping more operations into O'Hare without increasing runway capacity will cause present delays to worsen.

5. I raise these concerns because Mitchell Field can serve as a feasible alternative to dramatically expanding operations at O'Hare. As shown in the attached pamphlet, Milwaukee

County has been advocating increased use of Mitchell Field as an alternative airport to be used in addition to O'Hare. Mitchell Field can serve the air traffic needs of the Chicago-Milwaukee metropolitan market in a manner similar to the respective roles played by JFK, La Guardia and Newark Airports in the New York-New Jersey metropolitan complex.

6. Mitchell Field can serve as an air carrier airport alternative to O'Hare expansion on several levels:

A. As to transferring passengers who do not have the Chicago/Milwaukee area as an origin or destination, Mitchell Field can both relieve existing congestion at O'Hare by serving a portion of the existing transfer traffic and serve future transfer traffic forecast for O'Hare.

B. Mitchell Field can also serve as an alternative to O'Hare for many passengers who have the Chicago-Milwaukee area as an origin or a destination. Mitchell Field is in close proximity to Chicago's north suburban communities. Thus expanded service at Mitchell Field could serve the northern Illinois market and concurrently reduce demand upon O'Hare.

7. In contrast to the already crowded runway conditions at O'Hare, Mitchell Field is currently operating at approximately 50% of its airfield capacity. There is room for a substantial increase in traffic.

8. Further, because of Mitchell Field's relatively close proximity to Lake Michigan and relatively less urbanized surroundings—in contrast to the densely populated suburbs surrounding O'Hare—we believe that the noise impact of placing the operations at Mitchell Field would be less adverse than placing those operations at O'Hare.

9. In short, we believe that the FAA should consider Mitchell Field as a viable alternative to expansion of operations at O'Hare. We have a modern airport already constructed and

ready to serve the air traffic forecast by Chicago and the FAA to be jammed into an already crowded O'Hare.

FURTHER AFFIANT SAYETH NOT.

/s/ C. BARRY BATEMAN
Barry Bateman

Attachment

SUBSCRIBED AND SWORN TO
before me this 26 day
of November, 1984.

NANCY M. BURKART
Notary Public,
State of Wisconsin

My commission expires
June 15, 1986

## AFFIDAVIT OF WILLIAM C. SPERRY

William C. Sperry, having been duly sworn on oath, deposes and states that:

1. I reside at 2020 Peach Orchard Drive, No. 13, Falls Church, Virginia.

2. I am a registered professional engineer, specializing in analyzing problems of aviation noise.

3. From 1973-1981, I served in various positions as an official of the United States Environmental Protection Agency with responsibility for addressing the problem of aircraft noise. These positions included: Task Group Chairman on aircraft noise; Chief, Aircraft Noise Control; and Senior Technical Advisor in the United States Environmental Protection Agency, Office of Noise Abatement and Control. In these positions, I managed several major studies on the noise impacts of air carrier, general aviation and joint use airports. I was also responsible for developing several aircraft noise control regulations proposed by the EPA to the FAA.

4. From 1967 to 1973, I served as Chief of the Aircraft Noise Branch, Office of Noise Abatement, Federal Aviation Administration, Washington, D.C. At the FAA I was responsible for the technical development of the FAA's aircraft noise regulation.

5. From 1964-1967, I served as Manager, Noise Evaluation and Control, General Electric Company, where I managed General Electric Company's research efforts on noise evaluation and control of gas turbine aircraft jet engines.

6. From 1957 to 1964, I served as Manager of Acoustics Research at the Illinois Institute of Technology Research Institute (IITRI), where I was responsible for noise research on jet and propeller engines.

7. I have been asked to review and comment on the *Final Environmental Impact Statement Chicago O'Hare International Airport* (May 1984) (hereafter Final EIS) prepared by the Federal Aviation Administration.

8. The Final EIS describes a proposal by the City of Chicago (prepared as result of a Master Plan under the Airport Aid and Development Act) to expand operations at O'Hare Airport. The Final EIS reports that 1982 operations at O'Hare were 591,401. Chicago projects 1995 demand for air traffic operations to reach 920,600 aircraft operations.

9. It is my understanding that Chicago has forecast operations demand at O'Hare over the next 20 years at over one million aircraft operations per year. Twenty years is the planning period used by the FAA in evaluating Airport Master Plans, both as to required facilities to meet forecast demand and the environmental effects of meeting that demand.

10. By anyone's measure of significance, the proposed expansion of aircraft operations at O'Hare by several hundred thousand additional flights each year is significant. The Final EIS purports to analyze the noise impacts of these expanded operations at pp. 50-65 of the Final EIS and in various appendices attached to the Final EIS. The Final EIS also purports to discuss alternatives for reduced noise impact at pp. 66-70 of the Final EIS.

11. After examining the Final EIS, I conclude that the document is both misleading and deficient in its assessment of the noise impacts of the large expansion of operations and the alternatives available to avoid the adverse noise impact. The Final EIS is inaccurate and deficient for the following reasons.

### A. The Final EIS Fails To Recognize That Several Hundred Thousand More Aircraft Operations Means More Noise

12. Nowhere does the Final EIS make the critical comparison between continuing present levels of operation and

the proposed expanded operations. The decision here is to expand operations at O'Hare beyond their present levels. The critical noise comparison is between:

(1) the noise impact of servicing the current number of operations (1982—e.g. 591,401 operations) with the mandated future improvements in engine technology; and

(2) the future numbers of operations (e.g., 920,600) with the same mandated future improvements in engine technology.

This comparison is completely absent from the Final EIS. The O'Hare area is currently known nationally as one of the heaviest impacted aircraft noise areas in the Nation. To address this problem in part, considerable progress has been made in scheduling reductions in engine noise emissions. However, the benefits of these technological advancements in terms of reduced noise impact will never be realized by the communities around O'Hare. The proposed increase in the numbers of flight operations will eliminate most of the remedial effects of the improvements in engine technology.

13. A proper assessment of noise impact would compare the noise impact of the projected increase in operations—using the same level of engine technology—with the lower numbers of operations that would result from either continuing the current level of operations or selecting some other alternative level of operations. As discussed below, alternatives that would allow lower numbers of operations at O'Hare than forecast by Chicago would have less adverse impact.

**B. The Final EIS Uses A Noise Measurement Which Ignores the Adverse Noise Impact on Thousands of People**

14. The Final EIS uses a noise measurement of Ldn 65 dB, as a daily average, as the measure of objectionable noise. The number of people residing within this Ldn 65 dB area is then

calculated as the adversely affected population. The use of this Ldn 65 dB as a lower limit of adverse population impact is misleading.

15. It has been demonstrated that a statistically significant number of people are highly annoyed by aircraft noise at Ldn levels as low as 50 dB. This is particularly true in otherwise quiet residential neighborhoods which are impacted by aircraft noise. (See discussion below).

16. There is no analysis of this range of impact in the Final EIS. For a competent analysis of adverse noise impact, the forecast of aircraft induced noise impacts should extend to areas within the 50 dB range.

17. The Final EIS uses a noise measurement of Ldn 65 dB as the measure of objectionable noise based on peak month average day operations.

18. There would obviously be larger areas and more people exposed to aircraft noise of Ldn 65 dB or greater if the analysis had been based on the peak week average day or the peak day instead of the peak month average day. The Final EIS fails to identify or quantify the areas or people who would be subjected to objectionable levels of noise concentrated over periods of less than one month.

### C. The Final EIS Fails to Meaningfully Describe the Effect of Noise on People

19. The Final EIS fails to focus on the effects of aircraft noise on people. The adverse effects of aircraft noise on people are severe. Aircraft noise disturbs people in at least the following ways:

(A) Aircraft noise interferes with normal conversation and various other audio activities such as education, lectures, radio, television, and social events. People must raise their voices and often shout to be understood.

Alternatively, they must cease all conversation until the noise diminishes. This is very disruptive of educational, business and social communication and impacts both outdoor and indoor activities.

(B) Aircraft noise disrupts sleep. Aircraft noise has been well documented as interfering with sleep by either preventing affected people from going to sleep or by waking people up. The consequences of such sleep interference are fatigue resulting in reduction of productivity as well as a general feeling of discomfort.

(C) Aircraft noise intrudes on the use and enjoyment of property and degrades the relative attractiveness of real estate. The FAA has estimated that an annual average 1 dB increase in noise will reduce property value by approximately 1.5 percent. See e.g. *Final Regulatory Evaluation: Metropolitan Airports Policy* (FAA 1981), Appendix C.

20. These are well known impacts of aircraft noise. However, the main volume of the Final EIS makes virtually no mention or discussion of these effects on the residential communities surrounding O'Hare.

21. Buried in Appendices O and P of the Final EIS, almost as an afterthought, is a generic discussion of these effects without any application to the specific situation in the communities surrounding O'Hare. Appendices O and P are simply excerpts from previous FAA reports on noise.

22. Indeed, the data in the FAA report in Appendix P is inconsistent with FAA's use, in the O'Hare Final EIS, of a peak month average day Ldn 65 dB as the maximum area of impact. The studies referred to in Appendix P show adverse effects in other communities at levels of Ldn 55 dB.

23. It is also obvious from Appendix P that different communities have different sensitivities to noise. For example, highly urbanized communities with a high degree of

background noise are less affected by the noise levels from aircraft operations than are suburban residential communities. Thus, in order to evaluate the severity of the noise impact, one must first calculate the intensity and extent of the noise contour to levels from 50 dB and up. Second, one must conduct a statistically appropriate community survey of the communities under the flight path to determine their living patterns and background noise conditions. There is no evidence of such investigations and studies in the Final EIS for the communities around O'Hare.

### D. The Final EIS Fails To Identify And Quantify Alternatives Which Would Have Less Severe Environmental Impact

24. Beyond the failure of the Final EIS to adequately investigate and analyze the effects of aircraft noise on the surrounding communities, the Final EIS fails to examine and quantify various alternative measures which would substantially reduce or eliminate the adverse noise impact.

25. For example, the Final EIS completely fails to provide any quantitative forecast whatsoever of the amount of noise reduction which will be achieved by the "mitigation" measures listed at pp. 66-70 of the Final EIS. Without such a quantitative forecast of the noise impacts of these "mitigation" alternatives, it is impossible to determine whether there will be any significant noise reduction from these measures.

26. Beyond this lack of any quantification of the noise reduction alternatives listed in the Final EIS, the Final EIS also fails to identify and evaluate a number of significant alternatives used at air carrier airports elsewhere in the country to reduce adverse noise impact. These include:

A. Putting a ceiling on the number of operations that can use the airport. A limit on the number of operations would certainly reduce the noise impact, and is a technique

used at other air carrier airports around the Country. Chicago has acknowledged that many of the flights projected for O'Hare are interconnect flights which could use other airports.

B. Imposition of a night-time curfew. There is no discussion of limiting either the number of flights or the hours of flight operations during the night-time hours. Again, this is an alternative which has been used at other air carrier airports and which could have a significant beneficial impact on the noise injury inflicted on surrounding communities.

C. Soundproofing of residences. The Final EIS only mentions soundproofing schools. There is no discussion in the Final EIS of soundproofing residences. Again, soundproofing of residences is an alternative which has been used elsewhere.

27. The FAA is clearly aware of these and other alternatives used at other air carrier airports to reduce noise impact. Yet there is no mention of these alternatives nor any quantification of the noise reduction impacts of these alternatives in the Final EIS. Indeed the FAA has imposed some version of many of these noise reduction alternatives at Washington National Airport.

### E. The Two Proposed Runway Extensions Set Forth in the Final EIS Are "Major" Runway Extensions

28. I have been asked to evaluate whether the two runway extensions proposed in the Final EIS are "major" runway extensions within the meaning of the Airport and Airway Improvement Act of 1982. Under that Act, the Secretary of Transportation must make certain determinations if the project involves "major" runway extensions.

29. In FAA Order 5050.4 *Airport Environmental Handbook*, the FAA defines a "major runway extension" as follows:

> This is a runway extension which upgrades an existing runway to permit usage by noisier aircraft.
>
> p.2, paragraph 5, i

30. FAA in the same Order defines noisier aircraft as follows:

> . . . [N]oisier aircraft are aircraft over 12,500 pounds which are at least three decibels louder than aircraft currently using a runway as measured at one or more of the measuring points used to determine compliance with Federal Aviation Regulations, Part 36 (An aircraft more heavily loaded than the same aircraft currently using the runway under similar conditions may be a noisier aircraft under this definition.)
>
> p.3, paragraph 5,n

31. There is no question that the 1340 foot extension of Runway 9L/27R and the 1400 foot extension of Runway 14R/32L proposed in the Final EIS are major runway extensions within the meaning of the FAA Order and the statute. The extension of Runway 9L/27R would allow noisier larger aircraft to use the runway as well as allow more heavily loaded (and therefore noisier) aircraft of the same size to use the runway. As stated in the Final EIS:

> Due to the threshhold to intersection interaction between Runway 9L/27R, only small aircraft categories (Group 3) can currently arrive on 27R when 4L/22R is in use. The proposed extension of 550 feet will allow 2 and 3 engine narrowbody aircraft, such as the 727, 737 and DC9 (Group 4), to arrive on 27R when 4L/22R is in use.
>
> Final EIS, p. 36

> The extension of Runway 9L/27R would make it long enough to handle arrivals and departures by wide-body aircraft.
>
> Final EIS, p. 37

32. Similarly, the proposed extension of 1400 feet of Runway 14R/32L will be a major extension. This extension means that heavy aircraft arriving on 32L will touch down closer to the boundary of the airport, and necessarily means that these heavy aircraft will be lower—and noisier—on their approach over populated areas.

FURTHER AFFIANT SAYETH NOT.

/s/ WILLIAM C. SPERRY
William C. Sperry

SUBSCRIBED AND SWORN TO
before me this 27 day of November,
1984.

MELISSA A. STRAIN
Notary Public

## AFFIDAVIT OF SANFORD A. FIDELL

Sanford A. Fidell, having been duly sworn on oath, deposes and states that

1. I reside at 23139 Erwin Street, Woodland Hills, California 91367.

2. I am an experimental psychologist employed by Bolt Beranek and Newman Inc. since 1968, during which time I have extensively studied the effects of noise on people. These studies have included both laboratory and field investigations of speech interference, sleep interference, and annoyance produced by aircraft noise exposure, for federal agencies such as FAA, NASA, EPA, The Federal Highway Administration, and several agencies of The Department of Defense.

3. I have been asked to review and evaluate the *Final Environmental Impact Statement Chicago O'Hare International Airport* (May 1984) (hereafter Final EIS) prepared by the Federal Aviation Administration.

4. I have read and analyzed the comments of my colleague Dwight E. Bishop, contained in his affidavit, and I fully concur with his statements.

5. The Final EIS does not directly compare the noise impacts of current levels of operations at O'Hare (e.g. 591,401 reported in 1982) with the 920,000 operations forecast for O'Hare for 1995. Failure to compare these operational levels in common terms (i.e., with similar engine technology) obscures differences in noise effects associated with such a large change in numbers of operations.

6. The Final EIS lacks a rigorous and formal evaluation of noise effects on residential populations that would be affected by increased numbers of overflights. The appropriate procedure, known as "Fractional Impact Analysis", is well docu-

mented by Von Gierke et al. (1979), and has long been considered the most thorough approach to quantifying noise exposure effects for environmental assessments. The procedure calls for the affected population to be classified by magnitude of noise exposure; for these classes to be enumerated; for weights to be assigned to each class in accordance with the severity of exposure; and for an overall index to be calculated by summing the weighted impacts and population counts in each class. Without conduct of a Fractional Impact Analysis, it cannot be claimed that community response to noise associated with expansion of operations at O'Hare has been thoroughly evaluated.

7. The Final EIS neither describes nor evaluates numerous alternatives for noise reduction used at other airports around the country, nor does it consider the noise impacts of such alternatives on the communities surrounding O'Hare. Such alternatives are discussed (among other places) in a document prepared by BBN for FAA entitled "A Guidance Document on Airport Noise Control". Selected excerpts from this document appear in Appendix P of the Final EIS. Appendix P does not, however, include the first 90 pages of the document, which describe in detail various airport noise control alternatives in use at airports around the United States. Thus, the Final EIS does not adequately address noise control alternatives and their impact on the communities around O'Hare.

8. FAA's interpretation of a long-term outdoor Day/Night Average Sound Level of 65 dB as a de facto threshold of consequential effects of aircraft noise does not reflect the full range of available scientific information about effects of noise exposure on residential populations. Immediate annoyance can be caused by individual aircraft flyovers, despite the fact that the aggregate noise emissions of all flyovers, when averaged over a suitably long period of time, do not exceed an Ldn value of 65 dB. FAA's four sentence discussion of "Quantifying

Human Response to Noise" (paragraph C, p. 54, Vol. 1 of the Final EIS) fails to make a clear distinction between effects of cumulative vs. single event noise exposure.

9. Furthermore, annoyance is not the sole effect of noise exposure on people. Increased aircraft noise exposure associated with the projected expansion in numbers of operations also interferes with communication and other human activities. Speech interference, for example, is an immediate product of noise exposure, which defies meaningful quantification on an annualized average basis. Speech interference occurs during the course of aircraft flyovers, not continuously over arbitrarily long periods of time. Such findings are documented in the material published in Appendix P of the Final EIS. Figure 13, for example, shows that 20% or more of some residential populations can be highly annoyed by noise exposure at Ldn values below 65 dB. Figure 14 shows that widespread complaints may be anticipated at levels below FAA's de facto threshold as well. These anticipatable impacts in the vicinity of O'Hare airport receive no meaningful analysis in the Final EIS.

10. I personally directed one of the studies referred to on p. 475 of the Final EIS (Community Sensitivity to Changes in Aircraft Noise Exposure) which documented community response to changes in air transport noise exposure in the vicinity of Burbank-Glendale-Pasadena Airport in California. I also directed a community response survey concerning jet aircraft noise at John Wayne Airport in Santa Ana, California (Community Response to Three Noise Abatement Departure Procedures at John Wayne Airport, BBN Report 4743, June, 1982). Both of these studies were sponsored by FAA through NASA contracts.

11. Both of these studies demonstrate that sizeable percentages (about 40%) of residential households near certain airports report high annoyance from aircraft noise at exposure levels as low as an Ldn value of 60 dB.

12. The most reliable and situation specific way to estimate the prevalence (both extensity and intensity) of aircraft noise annoyance in the environs of a particular airport is by means of a social survey. The proper design of such a survey requires consideration of the full range of exposure levels prevailing throughout the area of interest, including areas of relatively low aircraft noise exposure. In its recent "Evaluation of the Test of Dispersal of Turbojet Aircraft Departure Tracks at Washington National Airport (1983-84)", for example, FAA calculated and measured Ldn values as low as 51 dB.

13. Surveys designed to evaluate community response to a wide range of aircraft noise exposure conditions, such as may be found in various areas in the environs of O'Hare airport, have previously been sponsored by FAA and other federal agencies. These include the previously mentioned Social Surveys at John Wayne and Burbank airports, as well as surveys at Los Angeles International Airport, the FAA's own Washington National Airport, Philadelphia, and at Kennedy International Airport in New York. Most of these surveys were undertaken in conjunction with evaluations of the noise effects of projects far smaller in scope than the presently proposed expansion of operations at O'Hare airport.

14. The Final EIS contains no indication that any site-specific consideration was given to prediction of community response to a large increase in aircraft operations at O'Hare airport. Its generic application of a de facto threshold of noise impacts at a long term Ldn value of 65 dB is a poor substitute for a formal Fractional Impact Analysis, frank discussion of

short term noise effects, and detailed consideration of local circumstances.

FURTHER AFFIANT SAYETH NOT.

/s/ SANFORD A. FIDELL
Sanford A. Fidell

SUBSCRIBED AND SWORN TO
before me this 27th day of November,
1984.

C.D. STRAYHORN
Notary Public

OFFICIAL SEAL
C.D. STRAYHORN
NOTARY PUBLIC—CALIFORNIA
VENTURA COUNTY
My comm. expires MAR. 11, 1988

## AFFIDAVIT OF DWIGHT E. BISHOP

Dwight E. Bishop, having been duly sworn on oath, deposes and states that:

1. I am an acoustical engineer employed by the acoustical consulting firm of Bolt, Beranek and Newman, Inc. (BBN)

2. I have been employed at Bolt, Beranek and Newman, Inc. since 1963 and am currently a Supervisory Consultant heading the Community and Transportation Noise Group in the Los Angeles Regional Office.

3. My formal education includes a Bachelor of Science degree in Engineering Physics and a Master of Science in Physics which I received in 1952. I am a Fellow of the Acoustical Society of America and a Member of the Institute of Noise Control Engineering as well as other professional societies.

4. Since 1949 I have been actively engaged in applied acoustics studies involving consulting, research and development projects for industry, local governments, and the federal government (for such agencies as NASA, the Air Force, Navy, EPA, HUD, and FAA). These studies have included noise measurement and prediction, and the assessment of the effects of noise on people and communities.

5. Since joining Bolt, Beranek and Newman, I have undertaken many noise studies at civil and military airports, and have completed a number of major aircraft noise measurement and prediction projects for state and federal agencies.

6. I have been asked to review and evaluate the *Final Environmental Impact Statement Chicago O'Hare International Airport* (May 1984) (hereafter Final EIS) prepared by the Federal Aviation Administration.

7. The basic premise of the Final EIS is that the noise impact of 920,000 operations in 1995 on surrounding communities will be roughly the same as the 591,401 operations level experienced at O'Hare in 1982. As stated in the Final EIS at p. 62 "Overall, the increases (in noise impact) just about equal the decreases.."

8. This premise is highly misleading for several reasons.

9. The Final EIS fails to quantify and compare the noise impact of different numbers of aircraft operations on the same technical basis. For an accurate comparison of the noise impact between 591,401 operations and 920,000 operations, both levels of operations should be compared with the same improvement in engine technology. By comparing a fleet for 920,000 operations, many equipped with quieter engines, with a fleet for 591,401 operations, many equipped with noisier engines, the Final EIS distorts the true noise differential between the levels of operations. What the O'Hare large expansion in operations does, is wipe out any noise benefits which would otherwise be obtained from the introduction of quieter "new technology" aircraft.

10. The Final EIS buries other significant facts about the dimensions of the proposed increase in operations. It takes a skilled reader to discover that in peak months, Chicago forecasts a 65% increase in jet aircraft operations at O'Hare in 1995 as opposed to 1982. (Compare pp. 298 and 301.)

11. Buried in the appendices to the Final EIS is the fact that there will be a substantial increase in the population exposed to average day-night levels of 75dB or greater—an extremely high level of noise exposure. According to Exhibit 16. Appendix A, the expansion will result in a 31.6% increase (almost 5000 people) in persons exposed to 24 hour day-night levels of 75dB or greater. As noted above, even this significant increase in adverse impact is understated by the failure to compare the levels of operations with the same engine tech-

nology. The difference in numbers of persons exposed to any level of cumulative noise impact—including greater than 75dB—would be much smaller at 591,401 operations than at 920,000 operations, if these levels were compared with the same engine technology.

12. Coupled with the failure to adequately describe the magnitude of the noise differences between 591,401 operations and 920,000 operations, is the failure to examine the wide range of alternatives used at other air carrier airports around the country to abate adverse noise impacts. These alternatives include limits on the number of aircraft operations or limits on the types of aircraft using the airfield. There is no discussion of any of these alternatives in the Final EIS.

13. In addition to the failure to examine various alternatives which other airports have used to reduce noise, the Final EIS completely fails to quantify the effects of any of the "mitigation" options listed at pp 66-79 of the Final EIS. Without such quantification, there is no basis for asserting that any of the measures listed will provide any significant noise relief to the communities surrounding O'Hare.

FURTHER AFFIANT SAYETH NOT.

/s/ DWIGHT E. BISHOP
Dwight E. Bishop

SUBSCRIBED AND SWORN TO
before me this 27th day of November,
1984.

C. D. Strayhorn
Notary Public

OFFICIAL SEAL
C. D. STRAYHORN
NOTARY PUBLIC—CALIFORNIA
VENTURA COUNTY
My comm. expires MAR 11, 1988

## AFFIDAVIT OF FREDRIC C. HAMBURG

Fredric C. Hamburg, having been duly sworn, on oath deposes and states that:

1. My name is Fredric C. Hamburg and I reside at 7007 Radnor Road, Bethesda, Maryland 20817.

2. I presently serve as principal air pollution consultant for the Bregman Corporation, a technical consulting firm specializing in environmental impact analysis and environmental compliance studies.

3. My expertise is in the technique and methodologies used to predict air pollution effects of existing and proposed sources of air pollutant emissions. I am a specialist in the science of atmospheric processes including air motion and the dispersion of pollutant substances.

4. I hold a B.A. in mathematics and an M.S. in meteorology and oceanography.

5. For twenty-three years (1937-1960) I served as an operational aviation weather forecaster for the United States Weather Bureau. Since then I have held a variety of positions in private industry, specializing in studies and applications of air movement and pollutant dispersion. My positions and duties include the following:

A. Principal Meteorologist/Engineer for Ford Instrument Company (Sperry-Rand)—1960-1965; classified military work;

B. Meteorological Engineer with Packard-Bell Electronics Corporation, responsible for the air pollution telemetering installation for New York City and Wayne County, Michigan (Detroit)—1965-1966;

C. As Senior Engineer/Meteorologist for TRW Energy and Environmental Services, I provided consulting services on air pollution control and air pollution dispersion for urban areas and for a variety of industries,

including electrical power plants and chemical plants; also for a major highway project—1968-1976;

D. As an official of TERA Corporation I provided consulting services to the electric power industry in air pollution monitoring and dispersion modeling—1976-1979;

E. I have subsequently served as a consultant to the Department of Energy on the subjects of acid rain and long range air pollution transport modeling. I have also served as a consultant to a variety of clients on the problem of emergency control of chemical spills and radiological releases into the atmosphere—1979-present.

6. I have been asked to review and comment on the *Final Environmental Impact Statement Chicago O'Hare International Airport* (May 1984) prepared by the Federal Aviation Administration. The Final EIS describes a proposal by the City of Chicago to expand operations at O'Hare Airport. Current reported operations at O'Hare were 667,963 in the year 1983. Chicago projects 1995 demand for air traffic operations to reach 920,000 aircraft operations. I am advised that Chicago has forecast operations demand at O'Hare over the next 20 years—the planning period used by the FAA in evaluating Airport Master Plans—at well over one million aircraft operations per year.

7. As a result of air traffic expansion at O'Hare, the FAA has stated that there will be a dramatic increase in aircraft related air pollutant emissions. The FAA states aircraft emissions will rise from 3,990.9 lbs. peak hour in 1979 for carbon monoxide (CO) (Exhibit 5, Appendix G) to 9,143.6 lbs. per peak hour (Exhibit 6, Appendix G) with the forecast traffic levels under the proposed expansion—a 130% increase in Carbon Monoxide emissions. Similarly, the FAA predicts an increase in hydrocarbon emissions from 1,376.8 lbs. per hour to 2,339.2 pound per hour—a 70% increase in hydrocarbon

emissions; also an increase in emissions of Oxides of Nitrogen (NOx) from 334.6 lbs. per peak hour to 953.5 lbs. per peak hour—again an increase of almost 180%.

8. The Final EIS purports to forecast the effects of this increase in pollutant emissions on the maintenance of National Air Quality Standards promulgated under the federal Clean Air Act. (The National Air Quality Standards are listed in Appendix G, Exhibit 1).

9. These forecasts of air pollutant concentrations are based on two sources: an emissions inventory and a pollutant dispersion analysis:

> A pollutant inventory was conducted to determine the total quantity of pollutants emitted within the study area. A dispersion analysis was conducted to determine the pollutant levels experienced at a single location.
>
> Final EIS, p. 81.

10. As described below, the FAA has failed to disclose the data and analysis supporting its emissions inventory and has produced a highly flawed and misleading dispersion analysis. The result is a serious understatement and misstatement of the potential severity of the air pollution concentrations resulting from the expanded operations at O'Hare.

**The Emissions Inventory**

11. The emissions inventory is nothing more than a calculation of the quantity of pollutants per unit time that are discharged at various levels of aircraft operations. One must know the rate at which a given air pollutant is being discharged before the pollutant concentration at downwind locations can be calculated.

12. I have examined both the emissions inventory values presented in Exhibit 5, Appendix G and the 1995 emissions inventory in Exhibit 6, Appendix G, Final EIS. Without

disclosure of the raw data and method of calculation used to produce those values—particularly the delay values for aircraft—it is impossible to determine the degree to which the emission rates published in Appendix G are accurate or inaccurate. The only published values are emission factors, which give the pounds per hour of pollutant emission for various types of aircraft at different points of the landing-takeoff cycle. Nowhere is there any supporting data or calculation as to the number of hours these aircraft will be operating at various levels of aircraft operations demand. This absence of information is particularly glaring for the taxi/idle and delay values published in Appendix G—periods when pollutant emissions are fairly high. Without the raw data and calculations that include the extent of aircraft delay at various levels of demand, it is impossible to verify the FAA's emission inventory, that is, its statement regarding the quantity and rate of pollutants that are and will be emitted.

**Dispersion Analysis**

13. To understand the seriousness of FAA's errors, it is essential that the Court understand how air pollutant concentrations are calculated and predicted through use of a *dispersion model.* A dispersion model is nothing more than a calculation methodology based on a highly simplified simulation of atmospheric processes, designed to answer two major questions:

A. How far and along what trajectory will the pollution be transported? This essentially involves determining the wind speed and wind direction (both averages and fluctuations) over a given time period, normally one hour or more, at the time and area of interests.

B. How much mixing or dilution of the pollutant with ambient air will occur over time and distance? Mixing and resulting dilution is the effect of "turbulent diffusion", and is related inversely to the stability of the air layer. During

unstable conditions, mixing in both vertical and horizontal directions is vigorous, resulting in high pollutant concentrations near the source and rapid decreases in concentration farther downwind. During stable conditions, very little vertical mixing occurs, and high pollutant concentrations are transported in a relatively narrow band to considerable distances downwind.

14. As to the "dispersion analysis" used by the FAA to predict air pollution concentrations at and around O'Hare, the values presented in Exhibits 8, 9 and 10 of Appendix G of the Final EIS are misleading. The FAA dispersion analysis violates basic professional standards of modeling procedure, and consequently the predicted values have no credence.

15. A dispersion model is a series of mathematical expressions that are developed on the basis of simplifying assumptions to permit easier calculation. It derives its link to reality only when it is statistically compared with real world monitoring from the site and time frame under study. The FAA's dispersion analysis suffers from a paucity of actual measured data, and makes no use of these measured data, however inadequate, to validate the dispersion model.

16. To determine how accurately a model predicts pollution values, one must compare the model results with real world data. In order to make such a comparison, one must have extensive baseline measurements of actual historical conditions from the site under study. Emission rates and observed atmospheric conditions are entered into the model, and the pollutant concentrations calculated by the model are then statistically compared with actual measurements of pollutant concentrations at the given receptor site during the same time period.

17. This process is known as model validation, and statistical relations so derived are used to calibrate the model in further use. Failure to validate and calibrate the model negates any claim of accuracy or representativeness in the model results.

There is no basis for claiming that calculations of air quality by means of an unvalidated and uncalibrated model merit acceptance.

18. EPA and others, including the Department of Transportation, have published extensive material on the basic data that must be obtained in a given study area in order to identify "hot spots" and to apply air pollution prediction models with any acceptable degree of accuracy. This information must include:

A. A baseline monitoring data base to provide the following measurements:

(1) continuous air quality measurements for the pollutants of concern with a minimum of 75% data capture for a period of at least one year. Monitoring sites should include:

(a) sites of expected maximum long-term and short-term average concentrations;

(b) sites of expected minimum concentrations;

(c) sites to provide background concentrations, sometimes the same as (b);

(d) sites at specified target areas, or receptors of concern;

(e) other sites where concentrations might be representative for the study area.

Monitoring at these sites should be run continuously for at least a year. If it could be shown conclusively that the highest concentrations of air pollutants occur during a specified season of the year to the exclusion of the others, EPA has allowed a minimum monitoring period of no less than four months' continuous measurements. See, e.g., 40 CFR 52.21(m).

(2) Concurrently, at one representative site that is open and unobstructed, there must be continuous measurements of wind speed and direction and a mechanism or parameters for determining atmospheric stability. Wind sensors should be exposed on an approved mast or meteorological tower at a height of 10 meters (33 feet) above the ground.

B. Development of a concurrent emission inventory, describing the quantity and rate of pollutant emissions during the same period covered by the monitoring program.

19. Once the essential background data is collected, the air pollution prediction model should be run with data input of observed averages (usually hourly) of wind speed, stability, and emission loading, with results aligned according to wind direction. Model calculations of pollutant concentrations are then statistically compared with corresponding actual measurements. This test will determine whether—using the same input conditions as actually observed—the model produces the same air quality results at the locations under study as actually observed.

20. Only after the described model run is validated against real world measurements can any statistical and scientific confidence be accorded to results predicted by the model for all other receptor sites and emission rates of interest.

## The FAA and Chicago's Erroneous Dispersion Modeling of Air Pollution Concentrations

21. I have reviewed the Final EIS, and in particular pp. 78-90 and Appendix G, which cover the air pollution analysis, to evaluate whether the FAA has accurately described existing and predicted air quality conditions in a manner consistent with sound scientific practice.

22. The so-called "existing" air quality conditions for the year 1979 are discussed on p. 86 of the Final EIS and in Exhibit 8 of Appendix G. The predicted future conditions which are compared to these "existing" 1979 conditions are discussed on p. 87 and in Exhibits 9 and 10 of Appendix G.

23. On examination, the 1979 "existing" values turn out to be computer projections wholly unsubstantiated by any actual measurements in 1979 at any of the 40 listed locations. These values are highly questionable and misleading, as the following discussion explains.

24. Both the so-called "existing" values for 1979 and the predicted values for 1995 display a departure, whether willful or ignorant, from EPA requirements and accepted practice in the air quality modeling community. They are seriously flawed in three key areas:

A. The entire modeling analysis was based on the use of a single wind speed of 9.7 mph—no slower speed was considered. all other things being equal, the slower the wind speed, the greater the concentration of air pollutants at a given receptor. There is no question that wind speeds far less than 9.7 mph are experienced at O'Hare Airport. With the model used by the City of Chicago and the FAA, a reduction in wind speed from 9.7 mph to 4.8 mph would result in a doubling of the pollutant concentrations shown in Exhibit 9 and 10 of Appendix G.

B. Similarly, the entire modeling calculation was based on the use of a single wind direction, 210 degrees, without any consideration of other wind directions. With other wind directions, a number of receptor sites in Exhibits 9 and 10 of Appendix G that show low concentrations could wind up with violations of the Air Quality Standards.

C. Furthermore, the modeling calculation was based on a single stability classification, Class D, which describes far more turbulent mixing than would occur under "worst case" conditions at O'Hare Airport, and thus seriously

understates the pollutant concentrations which would result. Stability conditions that characterize the "worst case," Class E or F, do occur with significant frequency at O'Hare Airport but were not modeled.

D. The FAA predicted values failed to include background concentrations of the pollutants under study.

25. In short, the air pollution results shown in the Final EIS simply do not represent or even approximate real world probabilities, and the entire analysis falls far short of EPA requirements and sound scientific practice. The violations of National Air Quality Standards for carbon monoxide and probably NOx are likely to be much worse and encompass many more receptor locations than shown in the Final EIS, Appendix G.

**The FAA's Failure to Develop Baseline Data**

26. The FAA clearly needs to collect real world baseline data for all the relevant variables, including air pollutant concentrations at specified receptors. For acceptable predictions of air pollution violations, the following information should be collected, as a minimum:

A. *Real world measurements of existing air quality.* The FAA should obtain continuous air quality measurements at specified receptor locations over a period of at least one year, with a minimum 75% data capture. A minimum period of four months of continuous monitoring might be acceptable if it can be shown that the highest concentrations of the pollutant are expected to occur in that time frame. See, e.g., 40 CFR Section 52.21(m).

Chicago did no baseline measurements of actual air quality in 1979 or at any other time which could serve as the real world basis for any modeling predictions. Instead of following prescribed monitoring guidelines, Chicago monitored for only five days at a time during each of the four seasons of the year in 1978, at 3 locations. Such

> sions of the pollutant are within the available growth increment of the approved State Implementation Plan.
>
> *Airport Environmental Handbook* (FAA Order 5050.4), pp. 33-34.

There is no evidence in the Final EIS that there will be an improvement in air quality or that the increased emissions are within the available growth increment of the approved State Implementation Plan.

**The Record of Decision Compounds the Errors in the FEIS**

32. I have also reviewed the Record of Decision, issued by the FAA on November 14, 1984. In that document, the FAA makes reference to several documents—prepared by Chicago and the FAA after publication of the Final EIS—which purport to quantify the severity of the violations of the air quality standards that will occur and to quantify the various air pollution control measures taken to insure compliance. (See pp. 11-13 of the Record of Decision).

33. For the first time, the FAA makes reference in the Record of Decision to its responsibilities under Section 176(c) of the Clean Air Act—nowhere mentioned in the FEIS. As discussed above, the FAA manual for air pollution assessment requires that the issue of Clean Air Act compliance of airport expansion proposals—including Section 176(c) compliance—be analyzed and resolved in the published EIS. (See attached chart).

34. Moreover, the Record of Decision is woefully deficient in disclosure and analysis. Nowhere are the quantitative data and documentation regarding the FAA's, Chicago's and EPA's analysis of new modeling of forecast violations—and the

quantitative analysis demonstrating how these violations will be eliminated as required by the Clean Air Act—disclosed for public and scientific scrutiny. Nowhere have the quantitative details of the FAA's "six-point" program (referenced at p. 12 of the Record of Decision) been disclosed for public and professional scrutiny.

35. From the limited narrative description that is disclosed in the Record of Decision—without any quantitative disclosure—it is quite likely that the FAA's new undisclosed computations compounded the errors contained in the Final EIS. As discussed above, it is scientifically improper to use an air pollution dispersion model to forecast future air quality violations—and the quantitative corrective measures to eliminate those violations—without validating the model against actual measured baseline conditions.

36. Neither the FAA, the EPA, nor the City of Chicago have developed the actual raw data baseline information necessary to give any validity to the modeling predictions. Without such actual baseline data for the key variables which are then used to validate the model, any gross hypothetical adjustments to key variables—e.g., wind direction, speed, stability—would compound the errors.

"snapshot" (Chicago's own description) data collection cannot serve as scientifically sound baseline data on which to calibrate a model. Chicago acknowledges this deficiency.

It must be emphasized that the four week measurement program *is far too short a period to provide a true indication of existing air quality* at O'Hare. According to guidelines suggested by the U.S. Environmental Protection Agency, sampling periods of *one year* or more are required to provide *reliable quantification of actual air quality levels.* Thus, the field measurements which were conducted only reflect the levels which existed during the actual four one week periods. The extent of these measurements *does not permit* any statistically valid extrapolation of air quality levels for any other periods of time.

p. V-2, Master Plan, Volume X (emphasis added).

In addition to the sparsity of the samples, the City used a sample bag methodology as opposed to continuous automatic monitors. Use of sequential samplers and bag collectors for monitoring criteria pollutants, including CO and NOx, is an obsolete technique subject to errors. More realistic values are obtained with continuous, automatic monitors with prescribed quality control, with recording by electonic data loggers and/or chart recorders.

B. *Concurrent continuous meteorological measurements.* Meteorological measurements should provide data on wind speed, wind direction, and stability. Wind sensors should be sensitive to low wind speeds and direction fluctuations, and should be exposed 10 meters above the ground. For determining stability, an approved technique should be used, preferably separate from operational weather observations. The meteorological data used by Chicago and the FAA for this program are coarse approximations that are likely to generate misleading or inaccurate

model predictions. Airport hourly weather observations used by the City are not appropriate for air pollution analysis because:

(1) Anemometer-wind vane sets at airports, especially major ones like O'Hare, are positioned too high for air pollution applications. The National Weather Service Annual Summary for O'Hare Airport shows a height of 65 feet (20 meters) for the wind set at this station, whereas the standard level of wind measurement for air pollution modeling is 33 feet (10 meters).

(2) Airport wind sensors, which have starting speeds of about 2.0 mph, are much less sensitive than those used in air pollution work, where required sensitivities involve starting speeds of 0.5 mph.

(3) Airport wind reports are periodic, not continuous. Under current NOAA and FAA instructions for hourly wind measurements, the wind speed and direction are observed over a one-minute interval taken about five minutes before the beginning of the hour of record. This one-minute sample is then recorded as the official wind for the entire hour. When these values are averaged over climatological time periods, five years or more, they develop a pattern that is similar to true hourly averages. However, for short range model predictions, such non-continuous observational data on wind speed and direction can lead to wide disparities in results compared with those obtained with true hourly averages of continuous measurements.

C. *Validation and calibration of an appropriate model.* As noted, no atmospheric dispersion model can be expected to provide reliable predictions of air pollution concentrations without prior validation and calibration against existing real world observations. Absent such

validation and calibration, the air quality predictions of such a model do not deserve credence by the scientific community or the courts. There was no validation or calibration of the model predictions published by the FAA in the FEIS.

**The FAA Final EIS Fails to Address the Issues of State Implementation Plan Compliance and The Problem of Non-Attainment**

27. The FAA has published a manual for air quality legal compliance for FAA airport approvals. It is entitled *Air Quality Procedures for Civilian Airports and Air Force Bases* (FAA Dec. 1982). In this manual and in the FAA's *Airport Environmental Handbook* (FAA Order 5050.4), the FAA has mandated certain procedures to implement its responsibilities under the Clean Air Act. (See attached chart).

28. Among these responsibilities is FAA's duty under Section 176(c) of the Clean Air Act which is described as follows:

> One of the key elements of the Clean Air Act Amendments and the [FAA] assessment process is the State Implementation Plan (SIP). Section 110 of the Act requires each State to adopt a plan which provides for implementation, maintenance, and enforcement of the primary and secondary national ambient air quality standards in that state. Section 176(c) states in part that no Federal agency shall engage in, support in any way or provide financial assistance for, license or permit, or approve any activity which does not conform to the SIP.
>
> *Air Quality Procedures for Civilian Airports and Air Force Bases* (FAA Dec. 1982), p. I-2.

29. This FAA manual requires the FAA's analysis of Section 176(c) compliance to be included within the Final EIS.

I find no discussion or analysis whatsoever of the issue of 176(c) compliance in the Final EIS. Yet, under the facts described by the FAA, the airport expansion will result in violations of the National Air Quality Standards in direct contradiction to the State's responsibilities under the Clean Air Act—which requires the State to develop a State Implementation Plan that assures achievement of and compliance with air quality standards. Consequently, by definition, FAA approval of the expansion does not conform to the State Implementation Plan.

30. Nor is there is any discussion in the Final EIS of quantitative pollution control action to assure achievement of air quality standards and elimination of demonstrated violations. As discussed above, the extent of any remedial measures necessary to eliminate violations of air quality standards can only be determined after the extent of predicted violations is calculated. Once the extent of the violations is known, the remedial measures must be shaped and quantified to affirmatively demonstrate achievement of air quality standards with quantitative reductions in emissions. To determine the extent of the violations and to quantify the necessary emission reductions, a competent baseline data collection program and the application of a validated and calibrated disperson model are indispensable.

31. Further, confirmation of predicted violations means that the O'Hare Airport Air Quality Control Region would constitute a "non-attainment area" within the meaning of Section 171(2) of the Clean Air Act. Under FAA Order 5050.4, when the airport location is in such an area:

> . . . designated as Nonattainment for a particular pollutant or pollutants, the Clean Air Act Amendments of 1977 require that, prior to development, the agency must demonstrate that there will be an improvement in air quality with regard to that pollutant or that the increased emis-

**The Final EIS Fails to Analyze the Air Pollution Impacts of Alternatives**

37. Finally, nowhere does the Final EIS or the Record of Decision discuss the effects on air pollution of using other alternatives instead of expanding operations at O'Hare.

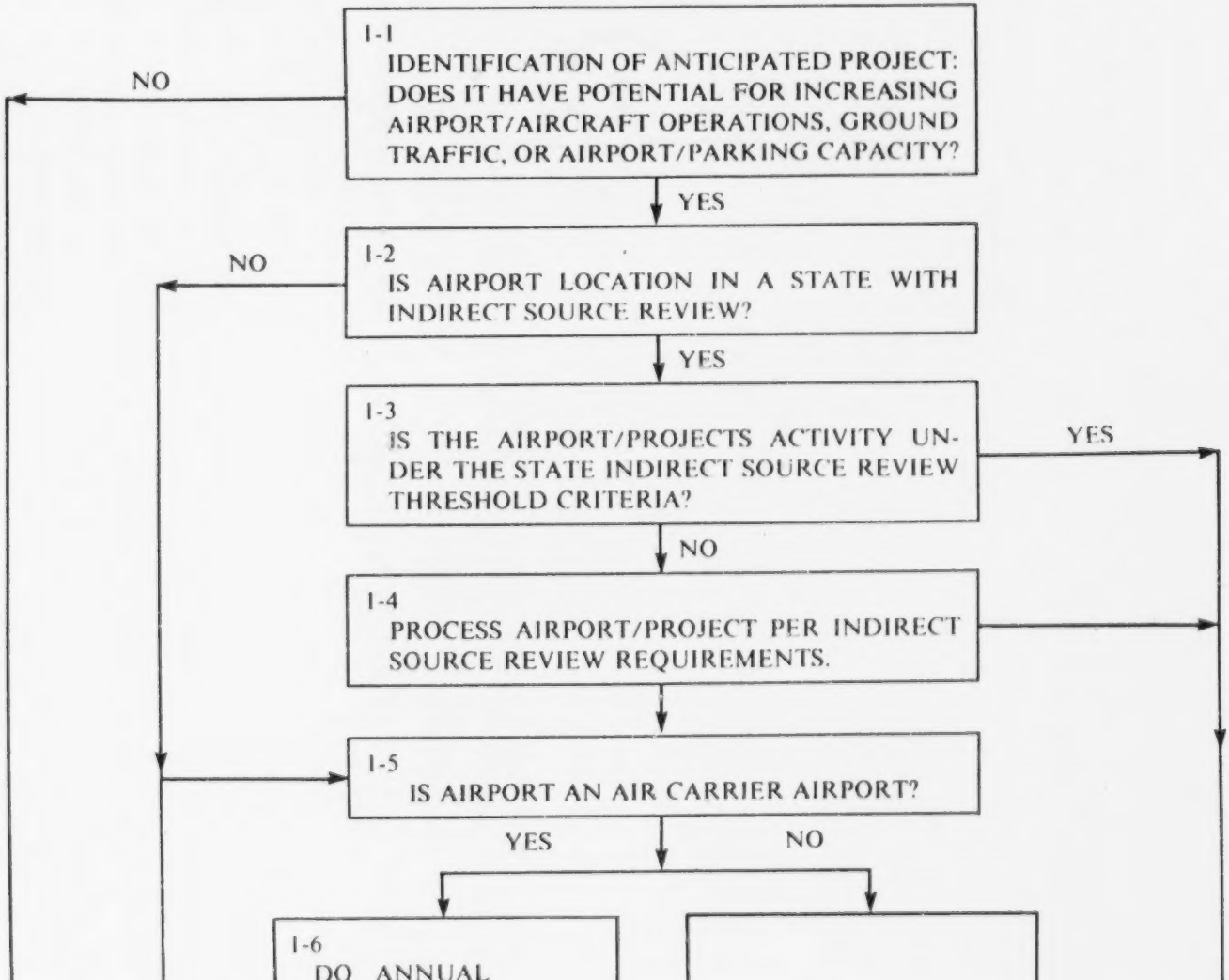
FURTHER AFFIANT SAYETH NOT.

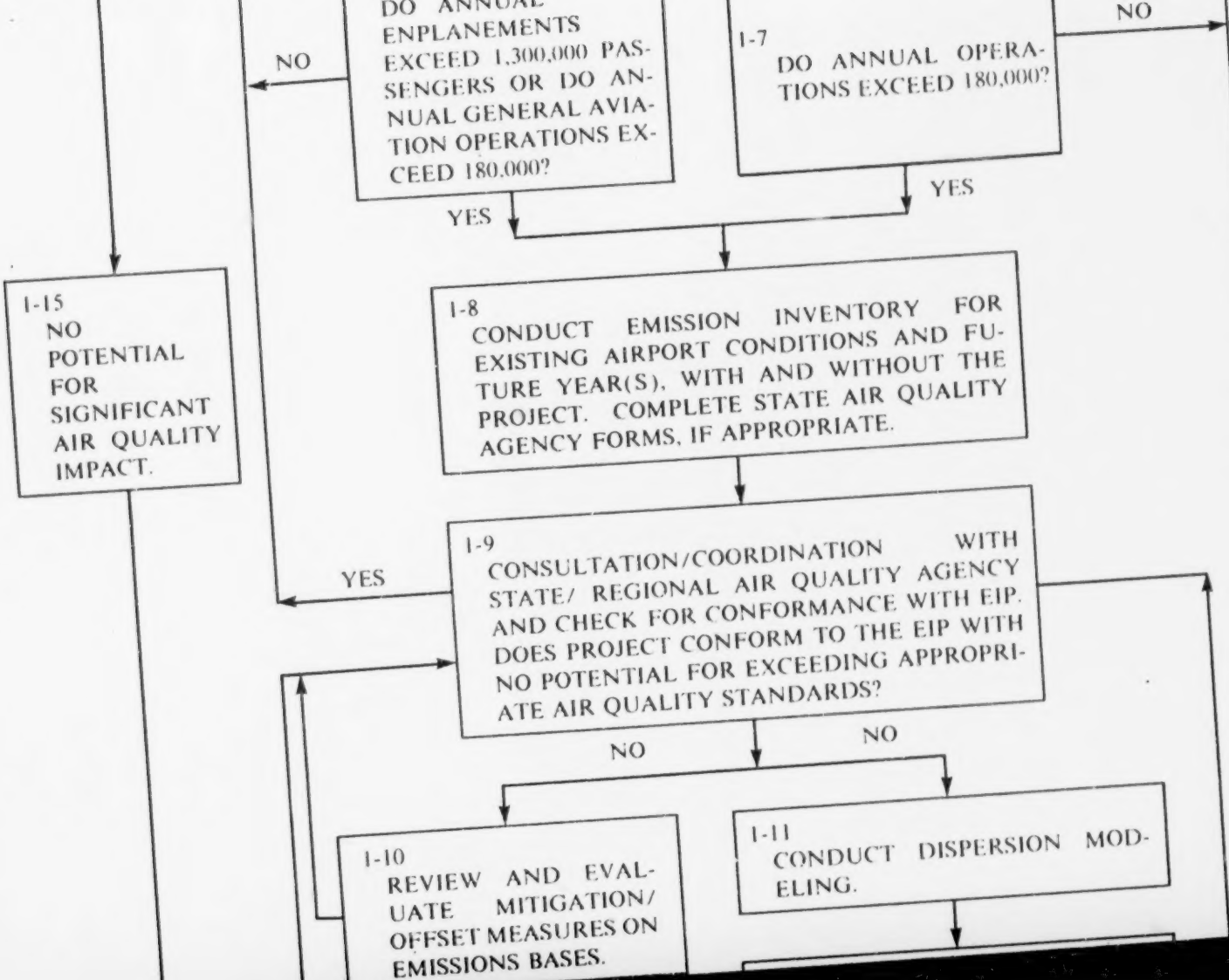
/s/ FREDRIC C. HAMBURG
Fredric C. Hamburg

SUBSCRIBED AND SWORN TO
before me this 26 day of November,
1984.

IRMA F. MIKELCHIK
Notary Public

# CIVILIAN AIRPORT AIR QUALITY ASSESSMENT PROCEDURES




DO ANNUAL ENPLANEMENTS EXCEED 1,300,000 PASSENGERS OR DO ANNUAL GENERAL AVIATION OPERATIONS EXCEED 180,000?
NO
YES
1-7
DO ANNUAL OPERATIONS EXCEED 180,000?
NO
YES
1-15
NO POTENTIAL FOR SIGNIFICANT AIR QUALITY IMPACT.
1-8
CONDUCT EMISSION INVENTORY FOR EXISTING AIRPORT CONDITIONS AND FUTURE YEAR(S), WITH AND WITHOUT THE PROJECT. COMPLETE STATE AIR QUALITY AGENCY FORMS, IF APPROPRIATE.
1-9
CONSULTATION/COORDINATION WITH STATE/ REGIONAL AIR QUALITY AGENCY AND CHECK FOR CONFORMANCE WITH EIP. DOES PROJECT CONFORM TO THE EIP WITH NO POTENTIAL FOR EXCEEDING APPROPRIATE AIR QUALITY STANDARDS?
YES
NO
NO
1-10
REVIEW AND EVALUATE MITIGATION/ OFFSET MEASURES ON EMISSIONS BASES.
1-11
CONDUCT DISPERSION MODELING.

exposure levels or increased susceptibility to their effects due to pre-disposing diseases or conditions can be made. There are many individuals in the general population at high risk for ozone, nitrogen dioxide, formaldehyde, acrolein and other prolysis products which will be produced in increased quantities given an expansion of the airport. In addition, persons with a genetic deficiency such as serum alpha$_1$ antitrypsin are at considerably increased risk due to these irritants. Individuals with certain diseases of the red blood cell also would be at increased risk due to ozone exposure. These include individuals with paroxysmal nocturnal hemoglobinuria hemolysis, acanthocytosis, erythropoietic protopophyria, and glucose-6-phosphate-dehydorgenase (G-6-PD) deficiency.

24. The final step in a health evaluation of a proposed airport expansion is a risk assessment based on the estimated increase in ground and air traffic, the evaluation of the toxicities of the substances produced, and the identification of populations and numbers of people at risk, particularly those at high risk. Such an assessment would predict the expected health effects resulting from the expansion of the airport.

25. The Final EIS clearly does not include such a risk assessment, nor does it provide sufficient information to make a risk assessment of this particular airport expansion plan. Given the magnitude of the potential health risks involved, any decision to expand should be delayed until such a risk assessment can be made. At this point, it can only be said that the numbers of individuals who may be adversely affected, some seriously, cannot be stated. The toxic chemicals and gases which would be produced are capable of causing adverse health effects in many individuals in the population under varying circumstances of production and accumulation of these products and environmental conditions such as weather, temperature and barometric pressure.

26. Without a risk analysis, no assessment of the risk of cancer or toxic effects, either from present or future operations,

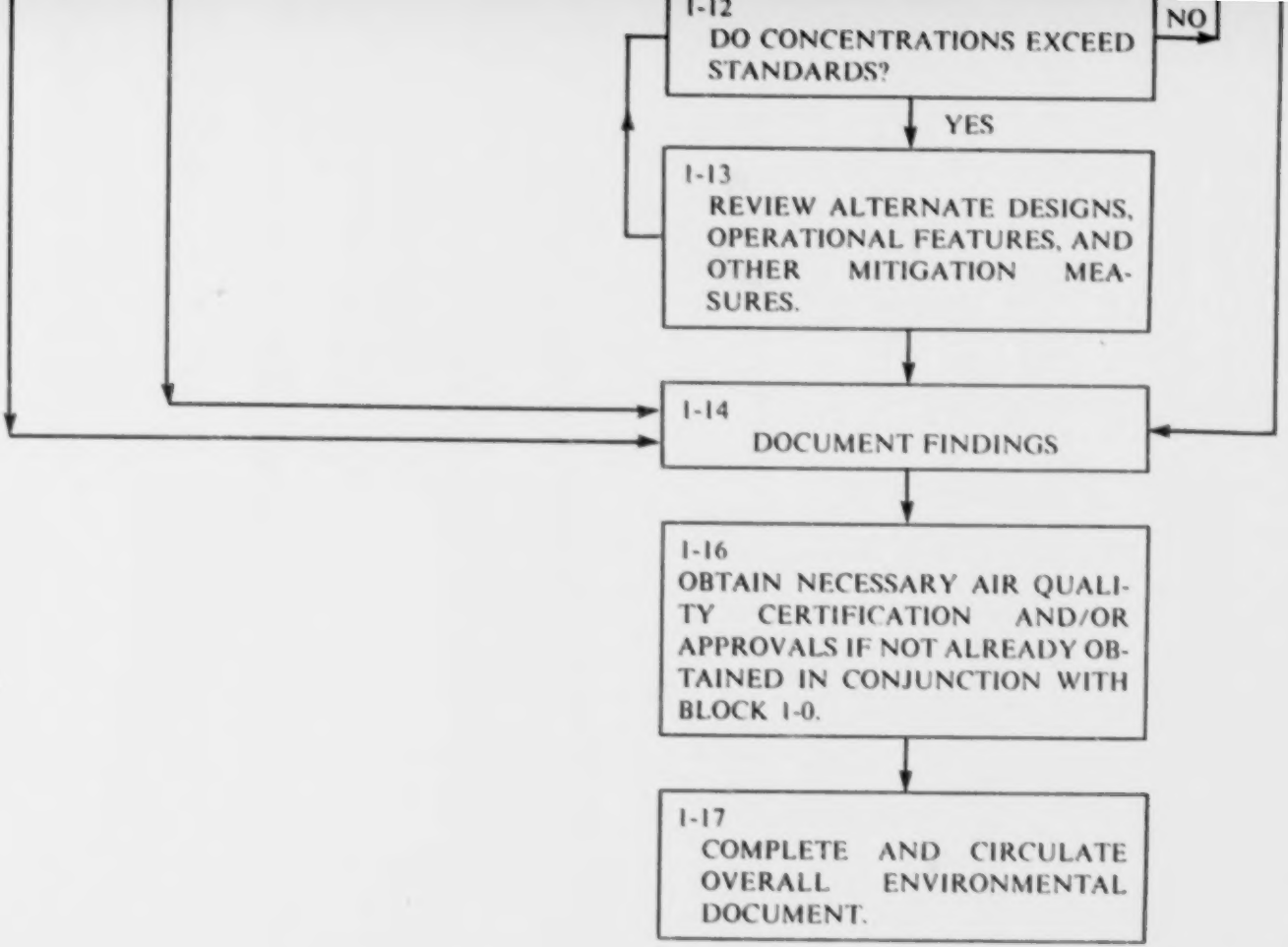
can be made. Without a risk assessment, no "worst case" analysis can be made.

FURTHER AFFIANT SAYETH NOT.

/s/ BERTRAM W. CARNOW
Bertram W. Carnow

SUBSCRIBED AND SWORN TO before me this 3rd day of December, 1984.

A. BRUCE WHITE
Notary Public


1-12
DO CONCENTRATIONS EXCEED STANDARDS?
NO
YES
1-13
REVIEW ALTERNATE DESIGNS, OPERATIONAL FEATURES, AND OTHER MITIGATION MEASURES.
1-14
DOCUMENT FINDINGS
1-16
OBTAIN NECESSARY AIR QUALITY CERTIFICATION AND/OR APPROVALS IF NOT ALREADY OBTAINED IN CONJUNCTION WITH BLOCK 1-0.
1-17
COMPLETE AND CIRCULATE OVERALL ENVIRONMENTAL DOCUMENT.

## AFFIDAVIT OF BERTRAM W. CARNOW

BERTRAM W. CARNOW, having been duly sworn on oath, deposes and states that:

1. My name is Bertram Warren Carnow. I am a physician trained in Internal Medicine, Occupational and Environmental Medicine and Toxicology, as well as Epidemiology.

2. I served for eight years as Director of the Environmental Health Resource Center of the State of Illinois, which functioned as part of the Department of Occupational and Environmental Medicine at the University of Illinois School of Public Health, and before that in the Section of Environmental Health in the Department of Preventive Medicine, College of Medicine.

3. I am board-certified in Occupational Medicine. I am certified in toxicology by the American College of Toxicology and in pulmonary disease by the American College of Chest Physicians.

4. I created and chaired the Department of Occupational and Environmental Health at the University of Illinois School of Public Health from its inception in 1972 until 1978. In 1976, I also became Director of the Division of Occupational Medicine at Cook County Hospital and the Director of the Great Lakes Center for Occupational Safety and Health at the University of Illinois in Chicago.

5. In pursuing my career in Environmental and Occupational Medicine, I have carried out multiple studies of the effects of air pollutants on health. These have included studies on the effects of sulfur dioxide on the respiratory tract and the heart, the effect of exposure to benzo-a-pyrene and other air contaminants on human cancer incidence, particularly respiratory cancer. For the past fifteen years, I have done research on the effects of air pollutants on populations at high risk.

16. The potential toxic and carcinogenic effects of the products of incomplete combustion and photo-oxidation cannot be taken lightly. Apart from the so-called nuisance effects which are widely known and perceived from exposure to these chemicals—e.g., the stench of jet fuel and the stinging of ozone—these chemicals can and do pose a severe health hazard.

17. All of these compounds have been shown to have negative health effects in humans at varying levels. Kerosene vapor, for example, can cause headache, stupor, and aspiration pneumonia when inhaled in high concentrations. Carbon monoxide (CO) combines with hemoglobin in the blood to form a relatively stable compound, carboxyhemoglobin. Hemoglobin molecules which have reacted with carbon monoxide are no longer available to carry oxygen. Individuals who may exhibit adverse health effects if the oxygen content of their blood is decreased make up a carbon monoxide high risk group which includes people with cerebrovascular or cardiovascular diseases, anemia and chronic lung diseases such as asthma and emphysema. Other CO high risk groups include fetuses, newborns and children, tobacco smokers, post-coronary joggers, and older persons.

18. Nitrogen dioxide ($NO_2$) and ozone ($O_3$) are deep lung irritants that can cause lipid peroxidation which may be cumulative with continuous exposure. Both can cause alterations in pulmonary function and increase susceptibility to respiratory infections, particularly in those with chronic lung disease. Ozone, a photo-oxidation product of the reaction of $NO_2$, hydrocarbons, and sunlight, has also been reported to cause chromosomal aberrations and an increase in neonatal mortality in laboratory animals.

19. In addition, nitrogen oxides can be reduced to nitrous acid which can nitrosate endogenous and environmental secondary and tertiary amines to N-nitroso compounds (nitrosamines). Over the last twenty-five years, voluminous data have

accumulated on N-nitroso compounds which show that a great majority of these compounds are potent carcinogens in a number of animal species.

20. Polynuclear hydrocarbons (PNH) are another product of incomplete combustion. Many polycyclic hydrocarbons are carcinogenic and have been shown to cause cancer of the stomach, gastrointestinal tract, brain, lymph organs and kidneys of many species of animals, including man. Studies carried out by us, and later used by the National Academy of Sciences in their document on polycyclic organic matter and cancer, reveal that for each increment of air pollution as indexed by one of these PNH's called benzopyrene, there was a corresponding increase in lung cancer in the population.

21. Formaldehyde and acrolein are also products of incomplete combustion or photo-oxidation and are irritants that affect the mucous membranes of the nose, upper respiratory tract, and eyes. They can be particularly irritating to individuals with allergies or asthma, or who wear contact lenses. Exposure to these chemicals can also increase pulmonary flow resistance and therefore seriously affect individuals at high risk because of chronic lung disease or asthma. Both formaldehyde and acrolein are mutagenic and teratogenic and many people are sensitized to them. Additionally, many individuals may become sensitized to them so that even at small doses, after a period of time, their health may be affected.

22. Once a quantification of the materials being released under existing conditions and under forecast levels of operation is made, an evaluation of the potential health consequences of the proposed expansion can be carried out. This evaluation would include summaries of the toxicologic properties of these substances based on medical and scientific knowledge gathered through animal experimentation, toxicologic research and epidemiologic studies of other exposed populations.

23. The identification of populations at increased risk to these substances in the O'Hare area because of potential high

**NO. 85-1073**
**UNITED STATES COURT OF APPEALS**
**FOR THE SEVENTH CIRCUIT**

**SUBURBAN O'HARE COMMISSION, et al.,**
*Petitioners,*

**ELIZABETH HANFORD DOLE, Secretary of the Department of Transportation, et al.,**
*Defendants.*

Petition for Review of a Decision of the Federal Aviation Administration and Department of Transportation

STATE OF ILLINOIS
COUNTY OF COOK } ss.:

## AFFIDAVIT OF MICHAEL C. ROSE

I, Michael C. Rose, being duly sworn under oath, state as follows:

1. I am currently employed by the U.S. Department of Transportation, Federal Aviation Administration, Great Lakes Region as an Airports Planner in the Airports Division, Des Plaines, Illinois. I have been employed in that position for the past 7 years and have been employed by the FAA for the past 9 years.

2. In my position, I furnish guidance in planning and environmental matters related to airports in the Great Lakes Region. With respect to O'Hare International Airport, I am designated as the "Responsible Federal Official" responsible to furnish guidance and participate in the preparation of environmental impact statements. In this capacity, I serve as the regional expert on environmental affairs.

3. As "Responsible Federal Official," I determined that proposed extensions to Runway 9L/27R and Runway 14L/32R are minor within the meaning of FAA Order 5050.4, Airport Environmental Handbook (Record, Vol. XXIII).

4. Paragraph 5.i. of FAA Order 5050.4 states a major runway extension "... is a runway extension which upgrades an existing runway to permit usage by noisier aircraft." Paragraph 5.n. of that order says "... noisier aircraft are aircraft over 12,500 pounds which are at least three decibels louder than aircraft currently using a runway as measured at one or more of the measuring points used to determine compliance with Federal Aviation Regulations, Part 36. (An aircraft more heavily loaded than the same aircraft currently using the runway under similar conditions may be a noisier aircraft under this definition.)"

5. In making the determination with respect to the runway extensions, I consulted Advisory Circular 36-3C (Record, Vol. XXX). This document list noise levels for various aircraft at FAR Part 36 locations. Since literally all aircraft in the civilian fleet are capable of operating on any of the six parallel runways at O'Hare, the analysis of noise from the "more heavily loaded aircraft" standpoint was necessary for the case at hand.

6. An analysis of aircraft noise levels based on weight (as a function of stage length) was accomplished using EPA Report 550/9-77-450, Calculation of Day-Night Levels (Ldn) Resulting from Civil Aircraft Operations (Record, Vol. XXIV). It gives noise levels for various civilian aircraft in decibels. Referencing the differential runway length (existing vs. proposed), and assuming normal payload existing vs. maximum gross takeoff landing weights, the resultant noise level for the noisiest aircraft using O'Hare is about 1.0 decibel. This is well below the 3.0 decibel threshold for major runway extensions. Accordingly, a determination of "minor" runway extension was made and so noted in the project description on the cover of the FEIS.

7. A general explanation of the "minor" runway extension designation was given in response to a comment received from

Du Page County Regional Planning Commission on page 165 of the FEIS (Record, Vol. XXII).

FURTHER AFFIANT SAYETH NOT.

/s/ MICHAEL C. ROSE
Michael C. Rose

Subscribed and sworn to
before me this 14th day
of March, 1985

Notary Public
VIRGINIA K. MARTENSER
Melrose Pk., Ill. Cook County
My commission expires:
My Commission Expires October
17, 1985



## SUPPLEMENTAL AFFIDAVIT OF WILLIAM C. SPERRY

WILLIAM C. SPERRY, being duly sworn on oath, deposes and states that:

1. I have previously prepared and signed an affidavit relating to the proposed Master Plan expansion of operations at the O'Hare airport. As set forth in my Affidavit of November 27, 1984, I formerly served as Chief of the Aircraft Noise Branch, Office of Noise Abatement, Federal Aviation Administration, Washington, D.C.; and I am a registered professional engineer, specializing in analyzing problems of aviation noise.

2. I hereby reiterate and reaffirm the statements contained in my Affidavit of November 27, 1984.

3. On March 14, 1985, I received a copy of the Affidavit of Michael C. Rose, an FAA planning employee, who purportedly made the decisions that the proposed runway extensions of Runway 9L/27R and Runway 14L/32R are "minor" within the meaning of FAA Order 5050.4, *Airport Environmental Handbook*. For the following reasons, Mr. Rose's conclusion that the extensions of Runway 9L/27R and Runway 14L/32R are "minor" are erroneous. There are three (3) purported reasons for the extension of Runway 9L/27R:

(A) Extending Runway 9L/27R would allow two and three-engined narrow-bodied aircraft arrivals on Runway 9L/27R when Runway 4L/22R is in use. This currently is not possible at O'Hare. (see Final EIS, p. 36);

(B) According to Page 37 of the Final EIS: "The extension of Runway 9L/27R would make it long enough to handle arrivals and departures by wide-bodied aircraft." On Page 36 of the Final EIS the statement is made, "Spatially, Runway 9L/27R is presently too short to effectively serve a wide variety of heavily loaded wide body aircraft."

6. I served as a member or chairman on a number of panels on the effects of environmental pollutants on health for the National Academy of Sciences, and was a member of the Medical and Biological Environmental Effects Committee for a number of years.

7. I also served as a consultant on environmental cancer to the Environmental Protection Agency and as a consultant on the effects of environment on health for the Council on Environmental Quality for the President of the United States.

8. I am currently a Professor in the Department of Environmental and Occupational Health Sciences at the School of Public Health and Professor of Preventive Medicine at the College of Medicine of the University of Illinois in Chicago. I also currently serve as Director of the Great Lakes Center for Occupational Safety and Health.

9. I have been asked by the member communities of the Suburban O'Hare Commission to evaluate the city of Chicago's proposal to expand facilities at O'Hare Airport and the environmental analysis of the expansion project proposal contained in the *Final Environmental Impact Statement Chicago O'Hare International Airport*, dated May 1984, prepared by the Federal Aviation Administration (hereafter Final EIS).

10. The Final EIS describes a proposal by the City of Chicago to expand operations at O'Hare Airport. Current reported operations at O'Hare were 667,963 in the year 1983. Chicago projects 1995 demand for air traffic operations to reach 920,600 aircraft operations.

11. This increase in aircraft operations will result in an enormous increase in aircraft related air pollutant emissions. The FAA states that aircraft emissions will increase from 3,990 lbs. per peak hour in 1979 for carbon monoxide (Exhibit 5, Appendix G) to 9,143.6 lbs. per peak hour (Exhibit 6, Appendix G), with the traffic levels forecast under the proposed expansion—a 130% increase in carbon monoxide emissions.

Similarly, the FAA predicts an increase in emissions of hydrocarbons from 1,376 lbs. per peak hour to 2,339.2 lbs. per peak hour (a 70% increase in hydrocarbon emissions) and an increase of oxides of nitrogen from 334.6 lbs. per peak hour to 953.5 lbs. per peak hour—again an increase of almost 180%.

12. These dramatic increases are estimates of what may be called the traditional general air pollutants for which national air quality standards have existed for many years.

13. Nowhere in the Final EIS is there any discussion of the health impacts of these emissions. Instead, compliance or non-compliance with national air quality standards is used as a proxy for the health effects of these pollutants.

14. I have read the affidavit of Mr. Fredric C. Hamburg and I am alarmed at the deficiencies he noted, both as to the emissions inventory and the dispersion analysis for these traditional pollutants. Use of a computer model to forecast air quality, without validation of the model with real world data, does not represent sound scientific practice.

15. In addition to the deficiencies in the air quality analysis identified by Mr. Hamburg, I am concerned over:

a. the failure of the Final EIS to identify and quantify the specific chemical compounds produced by incomplete combustion and photo-oxidation, both at current levels and projected levels of operation. The pollutants identified in the Final EIS are generic and the FAA does not isolate those chemicals which may have differential levels of toxicity.

b. the failure of the Final EIS to describe the toxic and carcinogenic effects of the chemicals so identified;

c. the failure of the Final EIS to identify the numbers of exposed population currently at risk from such toxic and carcinogenic chemicals, and to conduct an assessment of the increased risk to impacted populations from expanding the operations.

(C) Based on Mr. Rose's Affidavit, a third purpose of the extension would be to allow existing aircraft to depart on Runway 9L/27R under a heavier loaded condition.

4. I have analyzed the question of whether the extension of Runway 9L/27R would allow noisier aircraft as used in Paragraph 5A of FAA Order 5050.4, and have reexamined documents cited by Mr. Rose. To each of the announced purposes for the extension of Runway 9L/27R, I have the following conclusions based on the documents cited by Mr. Rose:

A. As to the purpose of allowing more operations of two- and three-engined narrow-bodied aircraft during the operation of Runway 4L/22R—a use which is not currently possible—it is impossible to calculate the increased noise differential without knowing: (a) the current level of frequency of use of Runway 9L/27R or (b) the proposed frequency of use for narrow-bodied aircraft of Runway 9L/27R when the extension is in place;

B. As to use of an extended Runway 9L/27R for wide-bodied aircraft, there is no question that use of wide-bodied aircraft over narrow-bodied aircraft would result in greater than 3 decibels of aircraft noise increase over similarly situated residential areas. The enclosed worksheet #1 shows the differential noise impact by aircraft type at 3.5 nautical miles from brake release based on type of aircraft. It is clear from this worksheet #1 that the differential noise increase would be greater than 3 dB by allowing wide-bodied aircraft to use this runway;

C. Finally, it is also clear that by extending the runway, the airport can use the runway extension for longer staged aircraft operations by the same types of aircraft. Again, as shown by the attached worksheet #2, the use of the runway for longer stage length aircraft of

the same type will result in a decibel increase of greater than 3 dB.

5. Thus, it is obvious from the basic information listed above, that the extension of Runway 9L/27R would allow noisier aircraft to use that runway within the meaning of the regulation.

6. For similar reasons, the proposed extension of Runway 14R/32L will allow noisier aircraft to use that runway. By extending the approach on Runway 14R/32L, heavier aircraft will touchdown closer to the boundary to the airport which necessarily means that the heavier aircraft will be lower and noisier on their approach over populated areas. At about 1 statute mile or less from touchdown, on their approach path, these lower aircraft will generate a noise differential greater than 3dB.

FURTHER AFFIANT SAYETH NOT.

/s/ WILLIAM C. SPERRY
William C. Sperry

SUBSCRIBED AND SWORN TO
before me this 15 day of March, 1985

A. BRUCE WHITE
Notary Public

## WORKSHEET #1

**Data from AC No: 36-3C**

| AIRCRAFT | | NOISE LEVEL (dBA) | |
|---|---|---|---|
| | | TAKE OFF | APPROACH |
| B-747 | MAX | 105.7 | 105.8 |
| | MIN | 90.0 | 92.8 |
| DC-10 | MAX | 96.4 | 97.3 |
| | MIN | 80.9 | 88.7 |
| B-727 | MAX | 92.6 | 98.0 |
| | MIN | 82.4 | 86.1 |
| B-737 | MAX | 88.0 | 94.5 |
| | MIN | 73.5 | 85.8 |
| DC-9 | MAX | 88.4 | 96.0 |
| | MIN | 78.6 | 83.9 |

EXAMPLES OF WIDE BODY VERSUS
NARROW BODY NOISE LEVELS



## WORK SHEET #2

**Data from EPA 550/9-77-450**

**ATA Takeoff Procedure**

| AIRCRAFT | DFBR (1000 Ft) | NOISE LEVEL (SEL dB) | | |
|---|---|---|---|---|
| | | MIN RANGE | MID RANGE | MAX RANGE |
| 747 | 10 | 109.0 | 111.7 | 115+ |
| | 20 | 99.8 | 101.0 | 104.8 |
| | 40 | 94.0 | 95.0 | 95.7 |
| | 80 | 87.2 | 89.4 | 92.0 |
| 727 | 10 | 112.0 | 115.2 | — |
| | 20 | 98.5 | 105.8 | — |
| | 40 | 92.0 | 95.0 | — |
| | 80 | 85.2 | 89.0 | — |

EXAMPLES OF EFFECT OF STAGE LENGTH
ON NOISE LEVEL

## AFFIDAVIT OF MARTIN J. BUTLER

MARTIN J. BUTLER, being duly sworn on oath, deposes and states that:

1. My name is Martin J. Butler and I reside in Park Ridge, Illinois.

2. I serve as Mayor of Park Ridge, Illinois.

3. I also serve as Chairman of the Suburban O'Hare Commission.

4. Contrary to the statements of Chicago's attorneys contained at Page 52 of City Respondents' Opposition to the Motion For Stay, the signatory members of the Suburban O'Hare Commission have, to the best of our ability, actively discouraged *new* residential land use activities in the areas suffering the heaviest noise impact from aircraft operations at O'Hare.

5. However, much of the area adversely impacted by O'Hare aircraft noise in Park Ridge and other Petitioner municipalities in this suit consists of *existing* residential uses. These areas include blocks where residential use has existed for decades.

6. At no time did the FAA or the City of Chicago approach Park Ridge or any of the other Petitioner municipalities to determine if the proposed expansion of operations at O'Hare was consistent with the zoning regulations and comprehensive plans of those municipalities as to *existing* residential uses.

7. I can state categorically that the *existing* levels of operations create adverse noise impacts inconsistent and incompatible with the zoning ordinances and comprehensive plans of Petitioner municipalities as to *existing* residential land use.

8. Expansion of O'Hare operations by several hundred thousand aircraft operations will necessarily create adverse noise impacts incompatible with and inconsistent with the zoning ordinances and comprehensive plans of Petitioner municipalities as to *existing* residential land uses.

9. In discussions preceding this suit, Petitioners asked Chicago for a legally enforceable permanent ban on new runway construction at O'Hare. Chicago not only refused to make the 1995 ban on heavy runways permanent, but also indicated a desire to install light aircraft (STOL) runways prior to 1995. It is my understanding that the purpose of such runways is to divert commuter and other light aircraft traffic away from the existing heavy aircraft runways, thus expanding the availability of the existing heavy aircraft runways to handle more heavy traffic.

FURTHER AFFIANT SAYETH NOT.

/s/ MARTIN J. BUTLER
Martin J. Butler

SUBSCRIBED AND SWORN TO
before me this 15 day of
March, 1985

A. BULLITH
Notary Public

## SUPPLEMENTAL AFFIDAVIT OF JOSEPH L. CARROLL

JOSEPH L. CARROLL, being duly sworn on oath, deposes and states that;

1. I have previously prepared and signed an affidavit relating to the proposed Master Plan expansion of operations at O'Hare Airport. As set forth in my affidavit of November 26, 1984, I serve as Director of the Transportation Systems Program, Pennsylvania Transportation Institute, The Pennsylvania State University.

2. I have examined the affidavits filed by the City of Chicago and the FAA in opposition to the motion of the Suburban O'Hare Commission and others to stay construction of Phase II of the Master Plan, as well as the legal briefs.

3. Based on my examination, I have found no statement in the opposing affidavits which contradicts the testimony given by me in my previous affidavit or given by Dr. Richard de Neufville or Dr. Robert Haveman.

4. In the brief filed by the FAA I do find for the first time an acknowledgement that with regard to Chicago's 20 year metropolitan demand, use of other cities' airports is a feasible alternative which can be used to accommodate the transfer traffic. Such acknowledgement is in direct contradiction to the rejection of this alternative in the Final EIS and the Record of Decision.

5. Acknowledgement that other cities' airports can be used to accommodate the transfer traffic portion of Chicago's 20 year metropolitan traffic demand is an acknowledgement that the 20 year forecast traffic could be handled by maintaining O'Hare at existing or lower levels to reduce noise with transfer traffic diverted to other cities' airports.

6. I have examined the record filed by the FAA on February 22, 1985 and can find no evidence of the following:

A. Either a base year 1974 or a base year 1980 revised 20 year metropolitan demand forecast.

B. Any traffic splits of that revised 20 year forecast based on differing uses of Midway.

C. No data, calculations or methodology by which I can recreate the capacity claim of 840,960 operations per year which the FAA and Chicago now claim is the capacity of O'Hare.

D. No benefit/cost or environmental damage comparisons of the various alternatives to meet the revised 20 year metropolitan demand.

7. I have examined the affidavits of Mr. Holder and Mr. Thomas filed by the City of Chicago. One of their major concerns is the increased delay which will be suffered by passengers if the expansion is not allowed to continue.

8. These passenger delays can be alleviated, if not eliminated, by redirecting the transfer traffic demand to other airports. This redirection can be either temporary or permanent.

9. As a transportation economist, I have also examined the various claims of irreparable injury that would be caused by the entry of an injunction order by this Court. I have the following observations:

A. The most irreversible impact of any action by the Court would be the sunk costs incurred in continuing construction if the Court did not enter a stay. As any transportation economist will agree, any construction funds now spent wil. be treated as sunk costs in any future comparison of expansion of O'Hare with other alternatives. Further, these unrecoverable expenditures will not be available as for other alternatives that are needed to meet the long term demand. Continued construction of the

Phase II expansion will necessarily severely bias future decisionmaking in favor of the Phase II expansion.

B. Any temporary construction wage losses or indirect construction benefits are not necessarily permanent losses. If, for example, as a result of an FAA reevaluation, the decision were made to build a new airport, the construction, labor, and indirect economic benefits would be far greater than the expansion of O'Hare. Alternatively, if an ultimate decision is made to expand O'Hare most if not all of the wages and other expenditures will be paid in any event.

C. Further, by purportedly planning for 1995 only, without examining the 20 year needs of the area (i.e. 1995-2005) and by piecemeal expansion of O'Hare through Phase II construction, the Chicago area will actually suffer economic loss by a) delaying investment in facilities for long-term aviation growth and b) by not servicing demand.

FURTHER AFFIANT SAYETH NOT.

/s/ JOSEPH L. CARROLL
Joseph L. Carroll

SUBSCRIBED AND SWORN TO
before me this 15th day of March,
1985.

A. BRUCE WHITE
Notary Public

# OPPOSITION

# BRIEF

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(3)

No. 86-1

Supreme Court, U.S.
FILED
AUG 4 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

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SUBURBAN O'HARE COMMISSION; THE VILLAGE OF ADDISON; THE VILLAGE OF BENSENVILLE; THE CITY OF DES PLAINES; THE VILLAGE OF ELK GROVE VILLAGE; THE CITY OF ELMHURST; THE VILLAGE OF FRANKLIN PARK; THE VILLAGE OF HARWOOD HEIGHTS; THE VILLAGE OF ITASCA; THE VILLAGE OF NILES; THE VILLAGE OF NORRIDGE; THE CITY OF PARK RIDGE; THE VILLAGE OF SCHILLER PARK; THE CITY OF WOOD DALE; and LAWRENCE C. BIENEMAN,

*Petitioners,*

v.

ELIZABETH HANFORD DOLE, Secretary of the Department of Transportation; UNITED STATES DEPARTMENT OF TRANSPORTATION; RUSSELL A. OLSON, Regional Representative of the Department of Transportation, Region V; DONALD ENGEN, Administrator of the Federal Aviation Administration; FEDERAL AVIATION ADMINISTRATION; PAUL BOHR, Director, Great Lakes Region, Federal Aviation Administration; JOHN GUIDOTTI, Supervisor, Illinois Section, Chicago Airports District Office, Federal Aviation Administration; THE CITY OF CHICAGO, a municipal corporation; and JEROME R. BUTLER, Commissioner of the Department of Aviation of the City of Chicago,

*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

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## BRIEF IN OPPOSITION FOR CITY RESPONDENTS

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1

SUBURBAN O'HARE COMMISSION; THE VILLAGE OF ADDISON; THE VILLAGE OF BENSENVILLE; THE CITY OF DES PLAINES; THE VILLAGE OF ELK GROVE VILLAGE; THE CITY OF ELMHURST; THE VILLAGE OF FRANKLIN PARK; THE VILLAGE OF HARWOOD HEIGHTS; THE VILLAGE OF ITASCA; THE VILLAGE OF NILES; THE VILLAGE OF NORRIDGE; THE CITY OF PARK RIDGE; THE VILLAGE OF SCHILLER PARK; THE CITY OF WOOD DALE; and LAWRENCE C. BIENEMAN,

*Petitioners,*

v.

ELIZABETH HANFORD DOLE, Secretary of the Department of Transportation; UNITED STATES DEPARTMENT OF TRANSPORTATION; RUSSELL A. OLSON, Regional Representative of the Department of Transportation, Region V; DONALD ENGEN, Administrator of the Federal Aviation Administration; FEDERAL AVIATION ADMINISTRATION; PAUL BOHR, Director, Great Lakes Region, Federal Aviation Administration; JOHN GUIDOTTI, Supervisor, Illinois Section, Chicago Airports District Office, Federal Aviation Administration; THE CITY OF CHICAGO, a municipal corporation; and JEROME R. BUTLER, Commissioner of the Department of Aviation of the City of Chicago,

*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## BRIEF IN OPPOSITION FOR CITY RESPONDENTS

## COUNTERSTATEMENT OF THE CASE

This case concerns a complex redevelopment and construction program at Chicago's O'Hare International Airport ("O'Hare"). The decision below denied the petition of the Suburban O'Hare Commission et al. ("Suburban") to set aside a final order of the Federal Aviation Administration ("FAA") approving an Airport Layout Plan ("ALP") for O'Hare. (A-5). The order was entered after nearly ten years of studies regarding future development of O'Hare, including almost three years of proceedings relating to the development of an Environmental Impact Statement ("EIS") concerning the proposed project and relating to various agencies' substantive environmental review. (A-6 to A-11).

The November 14, 1984 order of the FAA (A-69 to A-108), which permitted a $1.5 billion redevelopment of O'Hare to proceed, and accompanying Record of Decision, was made by the FAA pursuant to regulations issued under both Chapter 20 of Title 49 of the United States Code (*See* 14 C.F.R. Parts 77, 139 and 157) and Chapter 31 of Title 49 (*See* 14 C.F.R. Part 152). (A-69 to A-71, A-101, A-103 to A-108). A number of distinct decisions under these different statutory or regulatory authorities were made by the FAA in its November 14, 1984 order. (Court of Appeals opinion at A-14). The FAA order was the culmination of a process begun in 1975.

### A. The Master Plan Study

The City of Chicago ("City") in 1975 selected Landrum & Brown, Inc. ("L&B"), an aviation/airport consulting firm, to prepare a Master Plan Study ("MPS") concerning the operation and future development of O'Hare. The MPS when completed consisted of nineteen volumes and an ALP showing existing and proposed facilities the City deemed necessary for O'Hare. Each volume of the MPS examined different factors relevant



to the airport development, ranging from projected improvements in air traffic control methods, to environmental impacts, to aviation demand forecasts.

From early stages, the public generally and petitioners in particular were afforded extensive opportunities to participate in the assessment of environmental impacts, particularly noise, associated with the proposed further development of O'Hare. For example, in 1981 a Technical Working Group was convened in order "to provide airport user and community input in studying existing and future noise levels and methods available for mitigating aircraft noise impacts." MPS Vol. XIX, *Technical Working Group*, at I-2 (May 1982) (Book #10). The group included six representatives from Suburban along with two representatives from the FAA, two representatives of the Air Transport Association (the organization representing air carriers at O'Hare), and a representative of the City's Department of Aviation, as well as members of L&B in their capacity as consultants to the City.

Using funds provided under a community participation grant from the FAA, Suburban retained its own consultants, Ralph Burke Associates and Bolt, Beranek & Newman, Inc. These consultants reviewed L&B's methodologies for noise analysis and for aviation forecasts, and gave favorable reviews to both, concluding: "Methodologies used by L & B for [aviation] forecasts and noise analysis are widely used and generally accepted by the airport community and federal agencies." Ralph Burke Associates, "Interim Report on Review of O'Hare Airport Master Plan," reprinted as Appendix B to MPS Vol. XIX, *Technical Working Group*, at B-2 (May 1982). The Technical Working Group developed recommendations for reducing existing and future noise impacts through changes in airport/aircraft operational policies and in community land-use planning. *See generally* MPS Vol. XIX.

**B. Previous Litigation Involving the FAA Role at O'Hare**

While the Master Plan process unfolded, litigation was pending which then-Illinois State Attorney General William Scott had filed in 1974 against the FAA and the Civil Aeronautics Board. In that litigation the federal agencies were alleged to have violated the National Environmental Policy Act ("NEPA") by adopting a policy of unlimited growth at O'Hare. *State of Illinois ex rel. Scott v. Butterfield*, No. 74 C 2440 (N.D.Ill.). Suburban and other local governmental bodies were granted intervention in the litigation. Ultimately, that litigation was settled on October 15, 1982, when the FAA, the City, Suburban and other parties entered into a consent decree governing certain aspects of future airport development at O'Hare.[1] (A-109 to A-117).

The Consent Decree provided that all future development at O'Hare would comply with applicable law requiring environmental analyses and processing (Decree ¶ 1c) and that the City would process an EIS for seven general categories of O'Hare projects (Consent Decree ¶ 1d).

The decree also stated:

> ¶ 1f. Chicago agrees that the entire Master Plan development for O'Hare, including the projects identified in Paragraph 1.d above, will be presented to the FAA for Airport Layout Plan approval and the related environmental review, as a single, comprehensive submission. Chicago agrees that the environmental assessment which it provides to the FAA and the public in

[1] Of the fifteen petitioners in the current proceeding, only the City of Wood Dale and individual petitioner Lawrence C. Bieneman were not named parties to the *Butterfield* litigation and signatories to the Consent Decree. DuPage County, *amicus curiae* in the Court of Appeals, was also a party to *Butterfield*. Moreover, Bieneman participated in that litigation in his capacity as Mayor of Bensenville (on whose behalf he signed the Consent Decree). *See* A-115 to A-117.

connection with these projects will assess the impact of these projects on the assumption that the High Density Airports Rule will have been repealed.

¶ 1g. The FAA has not made any determination with respect to the matters described in Paragraphs 1.e or 1.f above, and this Decree does not bind the FAA with regard to any determination it may make respecting these matters.

(A-112).

In addition, the Consent Decree provided for continuation of the O'Hare Advisory Committee ("OHAC") through June 30, 1995. OHAC, which had previously existed on an *ad hoc* basis, was designated as the appropriate forum "for consideration of the relationship between O'Hare and the [plaintiff] communities." (Consent Decree ¶ 3). The Committee is composed of nine suburban representatives (seven of whom are required to be mayors and two of whom are required to be county commissioners), along with eight other members including one representative each from the FAA and the City Department of Aviation. *Id.* Finally, the decree requires establishment of a professionally staffed Office of Noise Abatement in the Chicago Department of Aviation. The Office is to receive and investigate complaints about airport noise and to forward those complaints to the OHAC, along with reports of action taken, if any; to report violations of FAA operational regulations concerning noise to the OHAC; and to evaluate the effectiveness of noise abatement procedures. *Id.* ¶ 2.

In conjunction with the Consent Decree, the parties to the *Butterfield* litigation also entered into an Intergovernment Agreement. R. Vol. II at 615-621. The Agreement provided that the City would use a specified analytic model in preparing a noise map showing the 65

Ldn contour,[2] which would be provided to the OHAC. Moreover, the parties agreed that the 65 Ldn contour "is a goal toward which the Communities, the People, the FAA and Chicago should aim in carrying out their respective obligations under this Agreement * * *." *Id.* ¶ 1.d.

The Agreement further provided that "[T]he Communities and Chicago shall take feasible and reasonable steps to discourage the further development of incompatible land uses around O'Hare and to reduce existing incompatible land uses, * * * [including] the distribution of noise contuor maps to zoning applicants and land developers, noise awareness program, and the like * * *." *Id.* ¶ 3.c.

Despite Suburban's and petitioners' promises in the Agreement, the Court of Appeals noted in March, 1986 that many of suburban communities "have resisted attempts by the City to harmonize their land-use regulations with the aviation activity at O'Hare." (A-30).

### C. Further Public and Suburban Participation in the Proposed Action

Pursuant to the Consent Decree Chicago and the FAA commenced preparations for submission of the entire proposed Master Plan development to the environmental review process. In October, 1982, the entire proposed environmental process was described to the public by the FAA and the City. R. Vol. XIX, p. 7573. The formal NEPA process began with "scoping" meetings in December, 1982. R. Vol. I, at 49-53 & 54-57. The public was

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[2] The 65 Ldn contour indicates the area within which aircraft noise exceeds 65 decibels, as measured on the Day-night Average Sound Level (Ldn) scale. That scale reflects number, duration and intensity of noise "events." The Ldn scale weighs nighttime noise (10 p.m.-7 a.m.) ten times as heavily as the same absolute amount of daytime noise, reflecting the fact that people perceive noise as more intrusive during the night. See Final EIS at 51 and App. P.

specifically invited to these meetings by notice published in the Federal Register. R. Vol. I at 117-18. Many people attended, including Suburban's Chairman, Mayor Martin Butler of petitioner Park Ridge. R. Vol. I at 123, 132-33, 143-47. Suburban filed four pages of written comments on the proposed scope of the EIS on January 11, 1983. R. Vol. I at 173-76. Other suburban interests, along with numerous federal agencies, also supplied written and oral comments as part of the scoping process. R. Vol. I at 162-95.

Using the scoping comments as a guide, the City prepared a Preliminary Draft Environmental Impact Statement, which was made available to the public in 28 libraries and other locations. R. Vol. I at 217-20. Suburban was provided with its own copy. A shorter summary of that Draft was also provided. MPS Vol. XVI (Apr. 1983) (Book 9a). Two informal meetings, not required by law, were held to explain the document and answer questions about its contents, methodology and conclusions. R. Vol. I at 236, 288-91; R. Vol. XXII at 111. Suburban was expressly invited and was told the City would "answer questions you may have regarding the preparation of the [draft]." R. Vol. I at 236.

Two public hearings were held on June 1 and June 2, 1983 at different suburban locations. R. Vol. I, pp. 288-362; R. Vol. XXII at 111. The complete transcripts of those hearings are contained in the Master Plan. MPS Vol. XVI, App. G at G-I-1 to G-I-307 and G-I-414 to 442 (Book 9c) and G-I-443 to G-I-584 (Book 9d). Suburban was provided with an uninterrupted period at the beginning of each hearing to make its comments, following the City's description of its plan. Suburban used one of those periods, MPS Vol. XVI; App. G at G-I-34 to G-I-49 (Book 9b), but not the other. *Id.* at G-I-441.

After the public hearings, numerous written comments were received. R. Vol. I, pp. 363-502; MPS, Books 9e, 9f and 9g. The City prepared its final 739 page Draft EIS

for submission to the FAA, including the City's responses to every comment received at the hearings or in writing (MPS, Books 9a through 9h), along with its proposed ALP.

Thereafter, the FAA prepared its own Draft EIS, based in part on the City's draft and in part on other materials. In December, 1983 that draft was circulated to the public and federal agencies for comment. R. Vol. II, pp. 627-645. Numerous comments were received, including comments from Suburban. R. Vol. II, III, pp. 819-1195.

In May, 1984, the FAA issued its final EIS which contained, among other things, responses to the comments it had received. R. Vol. XXII at 116-232. The FAA on June 15, 1984 published in the Federal Register the notice of availability of the final EIS. R. Vol. III at 1332. Within the following 30 day period additional comments were received by the FAA. The United States Environmental Protection Agency ("EPA") asked for more time for analysis, which the FAA granted. R. Vol. III, IV, pp. 1343-44, 1347, 1435, 1486. At the request of the EPA, mitigation measures were included by the FAA in the Record of Decision as conditions for its ALP approval. (A-91).

The extent of Suburban's long-standing participation and involvement in both the environmental and technical processing of the ALP is astounding. Prior to November 14, 1984, Suburban and its representatives had some 50 meetings and conferences, in addition to written submissions, with the City or the FAA about the proposed O'Hare development. (MPS, Book 10, Vol. 18).

### D. The FAA Conducted Airspace Utilization and Obstruction Processing as Part of the ALP Review

The first formal proposed ALP arising from the MPS process was filed with the FAA in April, 1983. MPS, Book 9a, p. I.1-5. As actually submitted, it consisted of

ten 3-foot x 4-foot sheets showing in detail the future O'Hare as the City proposed it. It included drawings of the future airport, and of airspace plans, runway approach plans, and the terminal area plan.

The proposed ALP was subjected to careful scrutiny by the FAA's technical divisions, including the Airports Division, R. Vol. XV, XVI and XVII, pp. 5963-6700, 6917-6936, Flight Standards Division, R. Vol. XII, p. 6701-6740, Airway Facilities Division, R. Vol. XVII, 6741-6752 and Air Traffiic Division. R. Vol. XVII, pp. 6753-6916. As the Record shows, the proposed ALP was revised repeatedly by the City to satisfy FAA concerns about the location, height and design of various facilities. *See, e.g.*, R. Vol. II, pp. 1090-1093. In some cases the City requested waivers or exemptions from certain FAA criteria and, after extensive procedures, some of those requests were granted. The final ALP is set forth in Volume XIV of the Master Plan. R. Vol. XII, p. 5001, K-T (MPS, Book 7). The grants of waivers and exemptions, without which the project might not have been feasible, are a major portion of the Record of Decision.

**E. Background of The Litigation**

As early as August 9, 1984, in a letter to Chicago's Mayor Harold Washington, Suburban threatened to bring "legal actions to prevent the proposed expansion." R. Vol. IV, pp. 1427-34. Nonetheless, Suburban waited until after the FAA's November 14, 1984 order before commencing litigation on December 4, 1984 with the filing of a complaint in the United States District Court for the Northern District of Illinois. (84 C 10387, Rovner, J.). Suburban prayed that the district court declare the November 14 FAA order "null, void and of no force and effect" and enjoin defendants "from taking any steps in reliance" on the FAA order. (A-36).

Both the FAA and City filed motions to dismiss contending that exclusive jurisdiction to review the FAA's

November 14 decision rested in the Court of Appeals, pursuant to 49 U.S.C. § 1486. In a comprehensive opinion, the district court found that since the November 14, 1984, order was entered in significant part under Chapter 20 of Title 49,[3] the Court of Appeals had exclusive jurisdiction to review the FAA's decision. (A-31 to A-68). Suburban appealed this dismissal.

Suburban had also filed a petition for review in the Court of Appeals on January 14, 1985. In this petition, Suburban again prayed that the FAA's November 14 order be set aside but challenged the Court of Appeals' jurisdiction. The Court ordered in March, 1985, that the jurisdictional issue be taken with its review on the merits. In its decision on March 13, 1986 the Seventh Circuit held that it, and not the district court, had exclusive jurisdiction to review the FAA's order. (A-14 to A-18). Having found jurisdiction, the Court of Appeals decided the merits of Suburban's petition based upon the voluminous record filed by the agency, found the FAA's decision to be supported by substantial evidence and, accordingly, denied Suburban's petition for review. (A-21 to A-30). In the companion appeal (No. 85-1423) from the district court's February 28, 1985 dismissal for lack of subject matter jurisdiction, the Court of Appeals on April 14, 1986 affirmed based upon its March 13, 1986 opinion in Docket 85-1073. (A-1 to A-2).

Suburban filed in the Seventh Circuit a petition for rehearing and rehearing *en banc* of the March 13 decision, shrilly charging:

> To tell the Emperor he has no clothes is a difficult task. Respectfully, the panel's opinion in this case rendered the court naked; naked in the eyes of over 400,000 people whose suffering from noise and toxic aircraft air pollutants was cavalierly dismissed by

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[3] The district court noted that Suburban did not contest that part of the November 14 order was issued pursuant to Chapter 20. (*See* A-43 to A-46).

> the Court; naked in the eyes of thirteen mayors and village presidents who now question the concept of a "Rule of Law" and the willingness and ability of courts to enforce the law; naked in the eyes of counsel who—instead of finding logic and reason in the decision—can only find a chaotic, inconsistent legal patchwork forcing square legal pegs into round holes in a desperate attempt to justify what appears to have been a pre-ordained decision.

(Suburban's Rehearing Pet. at 1-2)

On April 3, 1986, the Court of Appeals issued an order stating that no active member of the court had requested any action on the *en banc* rehearing suggestion and the original panel voted to deny the rehearing petition. (A-3). Suburban's petition in this Court followed.

## REASONS FOR DENYING THE WRIT

### I. Suburban Has Raised No Novel or Unsettled Questions of Law Concerning How the Decisions of Administrative Agencies Should Be Reviewed

Undaunted by this Court's unbroken line of precedent and the well-established procedures for judicial review of administrative decisions, Suburban boldly announces its right to *de novo* factual review of an agency decision—which was based upon a more than 10,000 page administrative record—even though such an outcome would require the overruling of a significant number of recent decisions of this Court beginning with *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971). No justification exists for this Court to abandon its rule that judicial review of agency decisions should be based upon the agency's record, with deference to the agency's particularized expertise.

Nonetheless, Suburban proclaims that there are only five perceived "models" which embody the exclusive standards and procedures to be applied by courts when review-

ing the decisions of administrative agencies. Under each of these "frameworks" Suburban contends the result is "clear." (Pet. at 17). "[W]hen there has been no agency trial required on material issues of fact, the material issues of fact are tried and determined in the District Court." (Pet. at 24). Suburban decrees that *de novo* judicial review of facts underlying administrative decisions should be the general rule, rather than a limited exception. Suburban criticizes the lower courts as having "lost sight" of the grand scheme Suburban discerns for the resolution of facts underlying agency decisions. (Pet. at 26).

Remarkably, Suburban blames the alleged confusion of the lower courts upon this Court's landmark decision in *Citizens To Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), which, according to Suburban, ". . . incorrectly described the procedures for addressing material issues of disputed facts when there has been no required agency trial below." (Pet. at 26, n.14). Suburban cavalierly suggests that *Overton Park* "ignores the Constitution and the express mandate of Congress" (Pet. at 26, n.14) and urges this Court to overrule *Overton Park*. In doing so, Suburban does not acknowledge that *Overton Park* has formulated the basic approach to judicial review of informal agency decisionmaking which has been consistently adhered to by this Court and the lower courts. Indeed, Suburban's argument ignores the fact that as recently as last year, this Court cited the teaching of *Overton Park* with approval and flatly rejected arguments very similar to those raised by Suburban. *Florida Power and Light Co. v. Lorion*, —— U.S. ——, 105 S. Ct. 1598 (1985).

Consistently since *Overton Park*, this Court has held that the task of a reviewing court is to apply the appropriate standard of review to an agency decision based on the record the agency presents to the reviewing court. "The court is not empowered to substitute its judgment for that of the agency." 401 U.S. at 416. Moreover,

"[t]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973).[4] The sole task of the reviewing court is to determine whether the agency has considered the relevant factors and articulated a rational connection between the facts found and the choice made based upon the specific record compiled by the agency and presented to the reviewing court. *Baltimore Gas and Electric Co. v. Natural Resources Defense Council*, 462 U.S. 87, 105-106 (1982); *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285-286 (1974).

Most significantly, in repeated decisions, this Court has rejected the very contention that Suburban advances. *De novo* review of the factual bases for an administrative action is not permitted, simply because a party challenging an agency decision claims there are facts in dispute. In *Overton Park* plaintiffs sought *de novo* review of the Secretary of Transportation's factual finding that there was no "feasible and prudent alternative" to a particular interstate highway route. This Court rejected *de novo* review, stating that it would be appropriate only when "the agency fact finding procedures are inadequate" or "when issues that were not before the agency are raised in a proceeding to enforce nonadjudicatory agency action."[5] 401 U.S. at 415. Neither of the limited excep-

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[4] Contrary to the teachings of *Camp*, Suburban generated and filed a stack of affidavits in both the district court and Court of Appeals and has reprinted them in its appendix. City Respondents moved to strike these affidavits, but the Court of Appeals held it need not decide that motion. (A-30 at n.11).

[5] There appear to have been very few subsequent cases in which a court has explicitly found either of these criteria satisfied. *See, e.g., Porter v. Califano*, 592 F.2d 770, 782-84 (5th Cir. 1979) (involving an obviously biased agency fact finder). The narrow exception enunciated has, in fact, been reserved for truly extraordinary cases. *See NOW v. SSA*, 736 F.2d 727, 744-46 (D.C. Cir. 1984).

tions is claimed to exist here. Instead, Suburban argues that *de novo* review of facts is the general rule and is always required when a party challenging agency action believes facts are in dispute.

In *Camp v. Pitts*, the party challenging agency action again sought *de novo* review of the facts upon which the agency decision was based. This Court followed *Overton Park* in ruling that it was "quite plain" *de novo* review was inappropriate.

Likewise, in *Florida Power and Light Co. v. Lorion*, —— U.S. ——, 105 S. Ct. 1598 (1985) (a case uncited in Suburban's petition), those challenging an agency action contended that a statute providing for initial review of an agency decision in the Court of Appeals should not be applied where alleged issues of fact required that judicial review be conducted by a court with "fact finding powers." The argument was flatly rejected.

> If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation. The reviewing court is not generally empowered to conduct a de novo inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry. We made precisely this point last term in a case involving review under the Hobbs Act. *FCC v. ITT World Communications, Inc.*, [466 U.S. 463] (1984); *see also Camp v. Pitts, supra.*

105 S.Ct. at 1607.

In this case, Suburban contends it is entitled to a *de novo* review of the facts supporting myriad FAA decisions relating to the approval of the ALP for O'Hare, through which 40 million passengers annually pass. (A-6).

Given *Florida Power & Light's* finding that an agency's 547 page informal record in that case was adequate (105 S. Ct. at 1607), the Seventh Circuit's assessment here that, based upon the FAA's record and the reasonableness of its ultimate decision (A-23), the FAA's decision "was clearly reasonable and clearly supported by substantial evidence" (A-27) is a correct application of the proper review standard.

There is no confusion among the lower courts about this point. The courts of appeals of virtually every circuit have held that *de novo* review of facts is limited to exceptional cases. *General Electric Uranium Management Corp. v. U.S. Dept. of Energy*, 764 F.2d 896, 903-04 (D.C. Cir. 1985); *BASF Wyandotte v. Costle*, 598 F.2d 637, 647-648 (1st Cir. 1979); *Sierra Club v. U.S. Army Corps of Engineers*, 772 F.2d 1043, 1051-52 (2d Cir. 1985); *Modine Manufacturing Corp. v. Kay*, 791 F.2d 267, 270 (3d Cir. 1986); *Virginia Agricultural Growers Association v. Donovan*, 774 F.2d 89, 92-93 (4th Cir. 1985); *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 904-05 (5th Cir. 1983); *Upjohn Mfg. Co. v. Schweiker*, 681 F.2d 480, 483 (6th Cir. 1982); *Bethlehem Steel Corp. v. U.S.E.P.A.*, 782 F.2d 645, 656 (7th Cir. 1986); *Occidental Engineering Co. v. INS*, 753 F.2d 766, 769-70 (9th Cir. 1985); *CF&I Steel Corp. v. Economic Development Administration*, 624 F.2d 136, 139 (10th Cir. 1980); *Pollgreen v. Morris*, 770 F.2d 1536, 1544-45 (11th Cir. 1985). No circuit court of appeals has declined to follow this rule.

Contrary to Suburban's view, a trial *de novo* is not routinely allowed whenever the challenger of an agency's action contends facts are in dispute and no formal trial type agency hearing has occurred. The commentators have also acknowledged the viability of this rule. Levin, *Federal Scope of Review Standards: A Preliminary Restatement*, 37 AD. L. REV. 95, 124-26 (1984); Currie and Goodman, *Judicial Review of Federal Administrative*

*Action: Question for the Optimum Forum*, 75 COLUM. L. REV. 1, 57-59 (1975). Thus, one authority has stated: "The Supreme Court has made it clear, beginning with *Citizens To Preserve Overton Park, Inc. v. Volpe*, that in most cases there will be a simple answer to these questions [when a court should permit discovery or hear evidence of facts outside the administrative record]: courts should not permit additional fact finding beyond the administrative record." McMillan and Peterson, *The Permissible Scope of Hearings, Discovery, and Additional Fact Finding During Judicial Review of Informal Agency Action*, 1982 DUKE L. J. 333, 333.

Suburban's effort to apply the Hobbs Act, 28 U.S.C. § 2341 *et seq.*, to mandate a district court evidentiary trial on disputed issues of fact, which the Court of Appeals charitably characterized as a "novel argument" (A-18), is specious. Not only has the Hobbs Act been found generally inapplicable to review decisions of agencies other than the five enumerated in it, *e.g. Xavier University v. National Telecommunication & Information Adm'n*, 658 F.2d 306 (5th Cir. 1981), but the Court of Appeals noted that no reported decision had applied the Hobbs Act to the review of FAA final orders. (A-18). The court found no indication that Congress had intended to apply the Hobbs Act to any agency other than the five prescribed in the statute. (A-18).

More importantly, this Court in *Florida Power & Light, supra*, in reviewing a decision admittedly controlled by the Hobbs Act, articulated no requirement for a *de novo* district court hearing to sort out any factual dispute regarding the agency's disposition of the three factual claims raised by the citizen petitioner. 105 S. Ct. 1598, 1600-01 and n. 2, 4.

The rule against *de novo* judicial review of facts rests upon the fundamental policy that courts should intervene in the agency decision making process as little as pos-

sible. As this Court stated in *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978): "Administrative decisions should be set aside in this context, as in every other, only for substantial procedural or substantive reasons as mandated by statute, not simply because the court is unhappy with the result reached." (Citations omitted). If any challenger to agency action were always free to assert that material facts are in dispute and if that assertion automatically entitled the challenger to *de novo* factual review in the district court, the courts would be innundated and complex agency decisions would be subject to being set aside solely because of a court's substantive disagreement with the agency's result.

Not only would Suburban's approach require overruling *Overton Park*—an invitation of Suburban's counsel rejected both by the district court here (A-67) and previously by the District of Columbia Court of Appeals in *Izaak Walton League of America v. Marsh*, 655 F.2d 346, 362 and n. 38 (D.C. Cir.), *cert. denied sub nom. Atchison, Topeka and Santa Fe Ry. Co. v. Marsh*, 454 U.S. 1092 (1981)—but, as the district court found, "suggests too much." (A-67). It inevitably would lead to the conclusion that any time a party merely alleges the existence of disputed facts, *de novo* review is triggered. Review on the record would then be discarded. Special judicial review statutes vesting exclusive jurisdiction in the courts of appeals would be immediately set aside and the statutorily-prescribed standards of review would become dead letters. Courts would consistently retrace the steps of agencies in substantial evidentiary proceedings and duplicate in full the fact-finding process. Such a wasteful imposition on the courts and emasculation of agency decisionmaking is neither good policy nor good law. All these possibilities are foreclosed by *Overton Park* and the consistent line of authority derived from *Overton Park*. Suburban's "bold invitation" (A-67, n.21) to overrule *Overton Park* should be soundly rejected.

**II. Suburban Has Not Identified Any Controlling Question as to Which There is a Conflict of Authority**

Suburban's attempt to characterize this case as raising an issue over which the circuits are in conflict is disingenuous indeed. Suburban suggests that a reason to grant a writ of certiorari in this case is to clarify the difference between the "substantial evidence" standard of review used by the Seventh Circuit in this case, and the "arbitrary and capricious" test. (Pet. at 26-29). Yet, Suburban actually opposes the application of *either* of these standards, insisting instead upon a full *de novo* trial before a district court. (Pet. at 26). As demonstrated above, such *de novo* review is out of the question.

The resolution of any perceived confusion regarding the application of the two more deferential standards would have absolutely no effect on the outcome of the instant case. First, the Court of Appeals applied the more stringent of the two standards, the substantial evidence test. *See American Paper Institute v. American Electric Power Service Corp.*, 461 U.S. 402, 412, n.7 (1983). Using this "substantial evidence" standard of review specified in 49 U.S.C. § 1486, the Court of Appeals stated that "[a] reviewing court determining whether the factual findings of the agency are based on substantial evidence weighs the evidence in the record supporting the decision against that which is contradictory. As long as sufficient evidence exists that a reasonable mind might accept as adequate to support a conclusion, the agency's findings must be upheld." (A-27, *quoting Aircraft Owners & Pilots Association v. FAA*, 600 F.2d 965, 970 (D.C. Cir. 1979)). After exploring in detail the 10,000 page administrative record before it, the Court of Appeals concluded that "the FAA's decision to approve the Airport Layout Plan was clearly reasonable and clearly supported by substantial evidence." (A-27).

Judicial scrutiny under the even more deferential arbitrary and capricious standard of review would not

have altered this conclusion.[6] Under the arbitrary and capricious standard, the reviewing court looks only to see whether the agency has considered all the relevant factors, whether the facts relied upon have some basis in the record, and whether these facts could lead a reasonable person to the same judgment. So long as an agency has done this, the reviewing court may not substitute its judgment for that of the agency. *Baltimore Gas and Electric Co. v. Natural Resources Defense Council*, 462 U.S. 87, 105-106 (1982). This standard of review would certainly have resulted in upholding the FAA decision here. Hence, it would be unrealistic at best for Suburban to claim that the difference between these two standards would make a corresponding difference in the outcome of their case. Rather, what Suburban desires is for a reviewing court to substitute its judgment for that of the FAA, because Suburban does not like the FAA's substantive decision. Suburban is not entitled to such *de novo* review and, accordingly, Suburban's petition should be denied.

### III. The Court of Appeals Correctly Decided the Jurisdictional Issue in This Case

It is far from clear whether Suburban is seeking review by this Court of the Seventh Circuit's holding that it had exclusive jurisdiction over Suburban's challenge to the FAA's order under 49 U.S.C. § 1486. To the

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[6] A number of the courts of appeals have suggested that there is little or no difference in the two standards. *Aircraft Owners and Pilots Ass'n v. FAA*, 600 F.2d 965, 969-72 (D.C. Cir. 1979); *Associated Industries v. U.S. Dept. of Labor*, 487 F.2d 342, 349-50 (2d Cir. 1973). The Seventh Circuit's conclusion that the more stringent "substantial evidence" test was to be applied, if anything, aided Suburban by requiring the FAA decision to pass muster under a standard more difficult to attain. Suburban has no ground to complain of this as error.

extent the argument is properly raised by Suburban's Issues Presented For Review,[7] it is wholly without merit.

First, to the extent Suburban attempts to renew its argument that the FAA decision at issue was made pursuant to Chapter 31 of Title 49, rather than Chapter 20, Suburban's argument is not supported by the facts. The express language of the Record of Decision establishes that at least three discrete decisions under the authority of Chapter 20, Title 49 were made by the FAA as part of its November 14, 1984 order. As the Court of Appeals correctly found, these substantial actions under Chapter 20 of Title 49 make exclusive Court of Appeals' jurisdiction under 49 U.S.C. § 1486(d) applicable, even when the petitioner's challenge asserts NEPA or other claims, including claims arising under the Constitution. (A-14 to A-16). *See also* the district court's exhaustive opinion to the same effect. (A-31 to A-68).

Second, to the extent Suburban contends jurisdiction does not properly lie with the Court of Appeals because there are disputed issues of fact which must be resolved in the district court or because the record is inadequate for judicial review, this argument is expressly foreclosed by three recent decisions of this Court. *Florida Power & Light Co. v. Lorion*, —— U.S. ——, 105 S.Ct. 1598, 1607 (1985); *FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 469 (1984); *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 592-594 (1980).

## CONCLUSION

For all the foregoing reasons the City of Chicago and Jerome R. Butler respectfully request that Suburban's petition for a writ of certiorari be denied.

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[7] Supreme Court Rule 21.1(a) provides that only questions "set forth in the petition or fairly included therein will be considered by the Court." *See General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 177-78 (1937).

Respectfully submitted,

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Dated: August 4, 1986

* Counsel of Record

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No. 86-1

# In the Supreme Court of the United States

OCTOBER TERM, 1986

SUBURBAN O'HARE COMMISSION, ET AL., PETITIONERS

*v.*

ELIZABETH HANFORD DOLE, SECRETARY OF TRANSPORTATION, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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## QUESTION PRESENTED

Whether opponents of an airport renovation project approved by the Federal Aviation Administration (FAA) are entitled to have their factual challenges to the FAA's conclusions adjudicated by a federal district court in a de novo trial.

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# In the Supreme Court of the United States

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

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## BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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### OPINIONS BELOW

The petition for certiorari seeks review of two decisions rendered by the court of appeals. The opinion of the court of appeals in No. 85-1073 (Pet. App. A4-A30) is reported at 787 F.2d 186. The memorandum order of the court of appeals in No. 85-1423 (Pet. App. A1-A2) is unreported. The opinion of the district court (Pet. App. A31-A68) is reported at 603 F. Supp. 1013.

## JURISDICTION

The judgment of the court of appeals in No. 85-1073 was entered on March 13, 1986. A petition for rehearing was denied on April 3, 1986 (Pet. App. A3). The judgment of the court of appeals in No. 85-1423 was entered on April 14, 1986. The petition for a writ of certiorari was filed on July 5, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. This case involves a challenge to the Federal Aviation Administration's (FAA) approval of an Airport Layout Plan [1] describing a $1.5 billion project to renovate and refurbish Chicago O'Hare International Airport, which is owned and operated by the City of Chicago. O'Hare has long been one of the busiest transportation centers in the world, serving the needs of regional, national, and international air commerce. Most of its facilities and runways were completed in the early 1960's, with one additional runway brought into service in 1967 and another in 1971. Originally designed to accommodate 20 to 25 million passengers annually, the airport's three passenger terminals recently have been called upon to handle nearly 40 million passengers a year. Pet. App. A5-A6; 17 R. Final Environmental Impact Statement (FEIS) 3. "Simply stated, O'Hare has grown to the point that demand for gate space and passenger amenities far exceeds the 20-year old facil-

[1] Previous agreements awarding federal aviation funds to O'Hare (see Pet. App. A76-A77) required that any alteration of the airport's existing physical plant first be proposed in the form of an Airport Layout Plan, which is essentially a detailed series of maps indicating the proposed changes, along with supporting documentation.

ities' ability to accommodate it. The airport currently handles twice the passenger volume for which [it] was designed" (*ibid.*).

Today's problems at O'Hare were not unanticipated. In 1975, Chicago began a long-range process designed to produce a plan that would respond to the region's aviation needs for the next two decades. The initial step in this process was the preparation of a Master Plan Study (MPS) by a consulting firm under contract to the City, with funding provided in part by the FAA. In the early stages of the Master Plan process, the City concluded that the projected demands for service at O'Hare could be accommodated only by the construction of two new air carrier runways. MPS IV-1. In 1980, however, the City concluded that this construction was undesirable, and that "constrained" development was preferable, "[b]ased upon considerations such as the level of community concern about the social costs of major expansion and extensive operational and financial analyses * * *." 14 R. 565, 566.

2. While the Master Plan Study was still in the preparation stage, opponents of growth at O'Hare sought relief in the courts. In 1974, the then-Attorney General of Illinois, William Scott, brought an action against the FAA and the Civil Aeronautics Board in which the federal agencies were alleged, among other things, to have violated the National Environmental Policy Act (NEPA) by adopting a policy of unlimited growth at O'Hare. *Illinois ex rel. Scott* v. *Butterfield*, No. 74 C 2440 (N.D. Ill.). Petitioners were permitted to intervene in that action.

The *Butterfield* litigation was settled on October 15, 1982, when the parties and intervenors entered into

a consent decree governing key aspects of future airport development at O'Hare. Pet. App. A109-A117. The decree provided that the City would present the Master Plan projects to the FAA for review "as a single, comprehensive submission." The FAA, in turn, agreed to process an environmental impact statement for those projects. The decree specified which projects would be covered in the City's submission and in the FAA's environmental impact statement. The consent decree also included a general provision that "[a]ll future development at O'Hare will comply with all then applicable requirements of Federal and State of Illinois laws requiring environmental analyses and processing." *Id.* at A110-A112. Finally, the decree provided for continuation of the O'Hare Advisory Committee (OHAC)—an organization whose members include representatives of Chicago's suburban communities—through June 30, 1995, and designated that committee the appropriate forum "for consideration of the relationship between O'Hare and the [plaintiff] communities" (*id.* at A113-A114).[2]

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[2] At the same time that the consent decree was signed, the participants in the *Butterfield* litigation entered into an Intergovernmental Agreement. 2 R. 615-621. That agreement provided that the City would use a specified analytic model in preparing a noise map and that a specified noise level "is a goal toward which the Communities, the People, the FAA and Chicago should aim in carrying out their respective obligations under this Agreement * * *." *Id.* ¶ 1(d). In addition, the agreement provided that "the Communities and Chicago shall take feasible and reasonable steps to discourage the further development of incompatible land uses around O'Hare and to reduce existing incompatible land uses * * *." *Id.* ¶ 3(c). Finally, the agreement acknowledged that Chicago "has no current plans to add new runways to O'Hare suitable

3. After the consent decree was signed in 1982, Chicago continued to refine and revise its plans for the development program. Eventually, the City decided, subject to FAA approval, to undertake a two-stage development of O'Hare's facilities. Phase I of the City's plan, which is not challenged in this litigation, involves the construction of a new terminal and an associated passenger concourse. Phase II is more extensive: it calls for replacement of the old international terminal, construction of new commuter and international terminals and new general aviation and cargo facilities, and minor extensions of two runways. Related projects also are planned, including development of aircraft taxiways, concourse aprons and holding pads; expansion of automobile parking and roadways; and relocation of several other facilities. FEIS 11-18.

In October 1982, the proposed environmental review process for the project was described to the public by the FAA and the City, initially at an OHAC meeting. 19 R. 7573. Shortly thereafter, the City and the FAA jointly held a public meeting to discuss the appropriate scope of the environmental impact statement to be prepared for the project. See 1 R. 49-53, 54-57. Representatives of petitioners attended, as did numerous other organizations and individuals. 1 R. 123, 132-133, 143-147. In addition, petitioners filed four pages of written comments on the proposed scope of the environmental impact statement. 1 R. 173-176. Other parties also supplied written and oral comments as part of the "scoping" process, as did several federal and state agencies. 1 R. 162-195.

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for aircraft classified by the FAA as 'large,' " and provided that Chicago would not bring such new runways into service before June 30, 1995. *Id.* ¶ 4(a).

After reviewing these comments, the City prepared a Preliminary Draft Environmental Impact Statement, which was made available to the public at nearly 30 libraries and other locations. 1 R. 217-220. In addition, public hearings were held on June 1 and June 2, 1983, at different suburban locations. Petitioners were provided with an uninterrupted period at the beginning of each hearing to make comments following the City's description of the plan. After taking into account all of the information available to it, the City put its Airport Layout Plan into final form and submitted it to the FAA for approval.

Upon receiving the Plan, the FAA performed its own assessment of the proposal, reviewing the information supplied by the City and the views received from petitioners and the public. On the basis of that review, the FAA prepared its own draft environmental impact statement, which was circulated for public comment in December 1983. After revising the document in response to the comments received, the agency issued a Final Environmental Impact Statement on May 31, 1984.

The FAA subsequently approved the Airport Layout Plan by a Record of Decision (ROD) issued on November 14, 1984 (Pet. App. A74-A102). The ROD described the scope of the project, potential alternatives, environmental considerations, and other factors. The ROD noted that the FAA had evaluated the proposal under Parts 77, 152 and 157 of the Federal Aviation Regulations (14 C.F.R. Pts. 77, 152, 157), which respectively govern obstruction evaluations for flight operations, the federal airport aid program, and notice requirements for airport construction or modification. Pet. App. A100-A101. The ROD fur-

ther observed that "[a]pproval of the Airport Layout Plan does not represent approval as far as necessity for the development is concerned * * *. It signifies a concurrence for planning purposes based on review of conformance with current standards for safety, utility, and efficiency" (*id.* at A75).

On December 4, 1984, petitioners filed suit in the United States District Court for the Northern District of Illinois, alleging that the approval of the Airport Layout Plan (ALP) violated the *Butterfield* consent decree, NEPA, the Airport and Airway Improvement Act, 49 U.S.C. App. (& Supp. II) 2201 *et seq.*, and the Clean Air Act, 42 U.S.C. (& Supp. II) 7401 *et seq.* The district court did not reach the merits of these claims, however, ruling that review of the FAA's decision was available only in the court of appeals (Pet. App. A31-A68). The district court noted that its decision did not bar petitioners from obtaining judicial review of the FAA's action, because on January 14, 1985, petitioners had filed a petition for review of the FAA's decision in the Seventh Circuit (*id.* at A37).

4. In their petition for review, petitioners alleged an array of factual and legal deficiencies in the ALP approval process and in the associated Final Environmental Impact Statement. These included an asserted failure to give adequate consideration to alternatives to the proposed project (specifically to the options of directing transfer traffic to other airports and of constructing a new airport); failure to analyze the impact of these alternatives; failure to disclose "data, calculations, methodology and worksheets"; failure to identify costs and benefits adequately and to include a cost/benefit analysis; and improper segmentation of the project. Petitioners also contended that the FAA's approval of the ALP violated the agency's regulations

for implementing the Clean Air Act, and violated the Airport and Airway Improvement Act by improperly concluding that the runway extensions shown in the ALP were "minor" rather than "major." Finally, petitioners argued that consideration of these issues required the decision of disputed questions of fact that could only be resolved by the district court.

The court of appeals rejected all of petitioners' claims. The court first determned that it had jurisdiction, concluding that the FAA's decision to approve the ALP was, in substantial part, an "order" made pursuant to Chapter 20, 49 U.S.C. App. (& Supp. II) 1301 *et seq.*, and as such was reviewable only in the courts of appeals as provided in 49 U.S.C. App. 1486. In reaching this conclusion, the court rejected petitioners' contention that approval of the ALP could not be considered an "order" because the administrative record was inadequate to permit judicial review. The court noted that "the existence of a reviewable administrative record is the determinative element in defining an FAA decision as an 'order' for purposes of Section 1486" (Pet. App. A17). Here, the court found the 53-volume administrative record adequate to allow for review. Similarly, the court of appeals found the Administrative Orders Review Act (Hobbs Act), 28 U.S.C. 2347(b)—which permits trial de novo in the district court of certain challenges to the decisions of five specifically enumerated agencies—inapposite here because the FAA is not among the agencies enumerated by Congress in the statute.[3] Pet. App. A18.

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[3] The court of appeals also rejected petitioners' assertions (not repeated here) that it lacked jurisdiction because the FAA's decision was made in part under Chapter 31, 49 U.S.C.

The court of appeals then addressed the appropriate standard of review. The court noted that, under Section 1486, the FAA's findings of fact, "if supported by substantial evidence, shall be conclusive" (Pet. App. A18). The court accordingly found the substantial evidence test applicable here. While it recognized "[t]he fact that the agency findings in this case were the product of an informal information-gathering process" (*id.* at A19), the court reasoned:

> The 'informality' of the FAA decisionmaking process is less important to our decision [to apply the substantial evidence standard] than the fact that petitioner's views were represented at virtually every stage of the decisionmaking process. * * * The lengthy and elaborate decisionmaking procedures preceding the FAA's November 14 decision in this case are not the sort of informal processes the drafters of the APA had in mind when they adopted the arbitrary and capricious standard of review.

*Id.* at A21. The court proceeded to apply this standard, rejecting all of petitioners' substantive contentions (*id.* at A21-A30).[4]

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App. (& Supp. II) 2201 *et seq.* (see Pet. App. A15-A16), and that district court jurisdiction to entertain the suit was created by the *Butterfield* consent decree (*id.* at A17).

[4] Petitioners meanwhile had filed an appeal from the district court's December 4, 1984, holding that it lacked jurisdiction to entertain their claims. Shortly after rejecting the petition for review on the merits, the court of appeals summarily affirmed the district court's jurisdictional ruling (Pet. App. A1-A2).

## ARGUMENT

Petitioners now make essentially one claim: that they have a right either to a hearing on the record before the FAA or to a trial-type proceeding de novo before a district court in which to contest the agency's factual conclusions. This contention, which cannot be reconciled with the decisions of this Court and of the courts of appeals, is wholly without merit and does not warrant further review.

1. As the court of appeals noted, the challenged FAA action was composed of four elements. Three of those elements were undertaken pursuant to Chapter 20 of the Federal Aviation Act; Section 1486 of that Act specifies that decisions rendered under Chapter 20 are reviewable in the court of appeals under a substantial evidence standard. The fourth element of the FAA's decision was rendered under Chapter 31. See Pet. App. A14-A16. While the Act does not specifically address judicial review of agency action taken under that Chapter, such decisions are reviewable under the Administrative Procedure Act (APA), 5 U.S.C. 704.

Thus, review was had here under the combined auspices of the Federal Aviation Act and the APA. Neither Act expressly requires use of an on-the-record trial-type proceeding in the context of an informal adjudication such as that conducted in this case by the FAA.[5] The Federal Aviation Act nowhere refers to such proceedings, and the APA requires them only where the underlying statute directs the agency to

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[5] The right to a trial-type hearing is generally denoted by Congress's inclusion in a statute of the words "hearing on the record." See *United States* v. *Florida East Coast Ry.*, 410 U.S. 224 (1973); *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 757 (1972).

conduct a formal adjudication "on the record after opportunity for an agency hearing." 5 U.S.C. 554(a). The relevant portions of the Federal Aviation Act contain no such language.[6]

2. Petitioners evidently recognize that the applicable statutory provisions do not expressly call for an on-the-record proceeding before the agency, and acknowledge that the courts lack the authority to require the FAA to hold such proceedings (Pet. 28, citing *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978)). Petitioners nevertheless assert (Pet. 27) that the court of appeals should have eschewed jurisdiction—in disregard of the express language of the Federal Aviation Act—and instead remanded the matter to the district court for a trial de novo. Petitioners base this argument on their view that "the Court of Appeals attempted to honor the letter of the

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[6] Petitioners do not appear to contend that a trial-type proceeding is constitutionally required under the Due Process Clause. To the extent that such an argument is advanced in the petition, however, it is without merit. While due process requirements are triggered only where a "liberty" or "property" interest is implicated (see *Board of Regents* v. *Roth*, 408 U.S. 564, 571 (1972)), "[g]eneralized health, safety, and environmental concerns do not constitute liberty or property subject to due process protection." *City of West Chicago* v. *Nuclear Regulatory Commission*, 701 F.2d 632, 645 (7th Cir. 1983); see *Izaak Walton League* v. *Marsh*, 655 F.2d 346, 361 (D.C. Cir. 1981), cert. denied, 454 U.S. 1092 (1982). See also *Bi-Metalic Co.* v. *State Board of Equalization*, 239 U.S. 441, 445 (1915). Moreover, it is clear that, in the context of congressionally created "public rights," Congress enjoys great latitude both in establishing agency factfinding mechanisms and in providing for judicial review of agency decisions. Cf. *Atlas Roofing Co.* v. *Occupational Safety & Health Commission*, 430 U.S. 442, 450-456 (1977).

statutory command without honoring the corollary requirement that the substantial evidence test [whose use is mandated by the Federal Aviation Act] only be applied where there has been an agency trial below" (Pet. 27).

Petitioners, however, are fundamentally mistaken in asserting that there is, as a general matter, any such "corollary requirement" of a de novo proceeding before a district court when the agency has not previously conducted an on-the-record hearing. In support of their contention, petitioners cite (Pet. 20-21) isolated portions of the APA's legislative history (and cite nothing at all from the background of the Federal Aviation Act).[7] But the text of the APA as en-

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[7] Petitioners' analysis of the APA's legislative history is flawed. As explained in the *Attorney General's Manual on the Administrative Procedure Act* 109 (1947):

> As to Clause (6) [now paragraph (F) of 5 U.S.C. 706(2)], the legislative history has resulted in misunderstanding. As S. 7 was introduced in the Senate, clause (6) was followed by a provision that "The relevant facts shall be tried and determined de novo by the original court of review in all cases in which adjudications are not required by statute to be made upon agency hearing." When S. 7 was reported by the Senate Committee, the quoted provision was omitted. Notwithstanding, the subsequent legislative history contains repeated statements to the effect that clause (6) embodies the "established rule * * * [which requires a judicial] trial de novo to establish the relevant facts as to the applicability of any rule and as to the propriety of adjudications where there is no statutory administrative hearing." Senate Comparative Print, June 1945, p. 20 (Sen. Doc. pp. 39-40); H.R. Rep. p. 45 (Sen. Doc. p. 279).
>
> To the contrary, the language of clause (6), "to the extent that facts are subject to trial de novo by the reviewing court," obviously refers only to those existing situa-

acted contains no such requirement of a de novo trial.[8]

That this omission was not an oversight is confirmed by *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971). That case involved a challenge to an agency's approval of the commencement and funding of a construction project. As here, no relevant statute expressly required the agency to make "formal findings" as part of its decision (*id.* at 409, 417; see also *Camp* v. *Pitts*, 411 U.S. 138, 140 (1973); *National Coal Operators Ass'n* v. *Kleppe*, 423 U.S. 388, 388-399 (1976)). As here, no relevant statute required an adjudicatory hearing "to produce a record that is the basis for agency action" (401 U.S. at 415). In these circumstances, this Court held that the agency decision was not subject to review by de novo trial; it explained that de novo review is available only where factfinding procedures are inadequate (and that there may be independent judicial factfinding where issues that were not before the agency are raised in judicial proceedings to enforce nonadjudicatory agency action). *Ibid.*; see *Camp*, 411 U.S. at 141-142. As in *Overton Park*, neither of these prerequisites to de novo review is present here.

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tions in which judicial review has consisted of a trial de novo. * * * In addition, there is no "established rule" requiring a judicial trial de novo wherever statutes fail to require an agency hearing.

[8] Indeed, the APA's judicial review provision, 5 U.S.C. 706(2)(F) (emphasis added), simply provides that the reviewing court shall set aside agency action "unwarranted by the facts *to the extent that* the facts are subject to trial de novo by the reviewing court." Thus, it is implicit in the APA that de novo review is available only if a de novo trial is *otherwise* required by applicable law.

Nor can petitioners derive from the inclusion of the term "substantial evidence" in Section 1486 a requirement that judicial review proceed de novo in the district court unless the agency previously has conducted on-the-record proceedings. Petitioners cite nothing from the legislative history of the Act supporting such a contention. Instead, petitioners attempt to demonstrate that Congress invariably correlated use of the substantial evidence standard of review by a court with a prior trial-type hearing before the agency. To this end, petitioners devote the major portion of their argument (see Pet. 18-23) to a discussion of what they term the "five basic frameworks" for judicial review of agency action involving disputed facts.

Petitioners' contention, however, rests on a non sequitur.[9] While Congress in some circumstances may have linked judicial review under a "substantial evidence" standard to the prior conduct by the agency of a trial-type hearing on-the-record, it has not invariably done so,[10] and petitioners have pointed to nothing in the Federal Aviation Act to suggest that

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[9] As the district court noted, petitioners' argument "inevitably leads to the conclusion that any time a party merely alleges that the agency's administrative record is insufficient, or that it is based on disputed fact issues, a special judicial review statute that vests exclusive jurisdiction in the Court of Appeals is immediately set aside in favor of jurisdiction in the district court" (Pet. App. A68).

[10] In a variety of statutes (*e.g.*, Consumer Product Safety Act, 15 U.S.C. 2060(c); Toxic Substances Control Act, 15 U.S.C. 2618(c)(1)(B); Occupational Safety and Health Act, 29 U.S.C. 655(j)), Congress has provided for review of rulemaking under a "substantial evidence" standard while failing to require that an agency conduct a formal hearing as part of its rulemaking process.

Congress created such a nexus here. To the contrary, Congress clearly indicated that review was to occur in the courts of appeals, and neither stated nor implied that such review was contingent upon the agency's prior conduct of an on-the-record hearing.

In any event, even if use of the "substantial evidence" standard is inextricably linked to the prior holding of an on-the-record hearing by the agency, that conclusion would suggest only that the court below should have employed the "arbitrary and capricious" standard in reviewing the FAA's decision—not that the court of appeals should have transferred the case to the district court. As the court below explained, petitioners' challenge does not fall within the narrow category of cases that may be sent to the district courts pursuant to the Hobbs Act. In the absence of such a statutory directive, the " 'focal point for judicial review should be the administrative record already in existence, not some new record made inititially in the reviewing court.' " *Florida Power & Light Co.* v. *Lorion*, No. 83-703 (Mar. 20, 1985), slip op. 14 (citation omitted). The court of appeals thus acted properly in considering the case on the record compiled by the FAA. And if the court erred in applying the ostensibly stricter substantial evidence test,[11] rather than the arbitrary and capricious

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[11] A number of courts, including the Seventh Circuit, have questioned whether there is any meaningful distinction between the two standards where, as here, informal agency action is under review. See, *e.g.*, *River Road Alliance, Inc.* v. *Corps of Engineers*, 764 F.2d 445, 449 (7th Cir. 1985), cert. denied, No. 85-785 (Mar. 3, 1986); *Aircraft Owners & Pilots Ass'n* v. *FAA*, 600 F.2d 965, 971 (D.C. Cir. 1979); *Associated Industries* v. *Department of Labor*, 487 F.2d 342, 349-350 (2d Cir. 1973), cert. denied, 416 U.S. 942 (1974); *Paccar*,

standard, that error plainly did not prejudice petitioners.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1986

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*Inc.* v. *National Highway Transportation Safety Administration*, 573 F.2d 632, 636 (9th Cir. 1978), cert. denied, 439 U.S. 862 (1979).

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No. 86-1

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

SUBURBAN O'HARE COMMISSION; THE VILLAGE OF ADDISON; THE VILLAGE OF BENSENVILLE; THE CITY OF DES PLAINES; THE VILLAGE OF ELK GROVE VILLAGE; THE CITY OF ELMHURST; THE VILLAGE OF FRANKLIN PARK; THE VILLAGE OF HARWOOD HEIGHTS; THE VILLAGE OF ITASCA; THE VILLAGE OF NILES; THE VILLAGE OF NORRIDGE; THE CITY OF PARK RIDGE; THE VILLAGE OF SCHILLER PARK; THE CITY OF WOOD DALE; and LAWRENCE C. BIENEMAN,

*Petitioners,*

*v.*

ELIZABETH HANFORD DOLE, Secretary of the Department of Transportation; UNITED STATES DEPARTMENT OF TRANSPORTATION; RUSSELL A. OLSON, Regional Representative of the Department of Transportation, Region V; DONALD ENGEN, Administrator of the Federal Aviation Administration; FEDERAL AVIATION ADMINISTRATION; PAUL BOHR, Director, Great Lakes Region, Federal Aviation Administration; JOHN GUIDOTTI, Supervisor, Illinois Section, Chicago Airports District Office, Federal Aviation Administration; THE CITY OF CHICAGO, a municipal corporation; and JEROME R. BUTLER, Commissioner of the Department of Aviation of the City of Chicago.

*Respondents.*

## REPLY IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT


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## INTRODUCTION

The issues before this Court focus on the standards and procedures for addressing material issues of disputed fact relevant to the legality of government action and the meaning and application of the doctrinal terms of art – "substantial evidence" and "arbitrary and capricious" – in addressing material issues of disputed fact.[1]

Respondents' briefs illustrate the fog of confusion that currently swirls over the determination of material issues of disputed fact relevant to the legality of government action. Instead of the consistent, historical understanding of the meaning and application of such terms of art as "substantial evidence" and "arbitrary and capricious", respondents rely in their briefs on decisions that say both: 1) that "substantial evidence" and "arbitrary and capricious" are the same; and 2) that "arbitrary and capricious" and "substantial evidence" are different. Respondents do not devote one word to the analytical bases for these inconsistent lines of cases.

This Court needs to act now to clear up this confusion in two related areas:

1. Confusion over the meanings and application of the terms of art "substantial evidence" and "arbitrary and capricious" as these terms relate to material issues of disputed fact relevant to the legality of government action.

2. Confusion over the related jurisdictional competence of the courts of appeal to address material issues of disputed fact which have not been tried and determined in an agency trial below.

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[1] Respondents appear to agree that there were genuine issues of material fact relevant to the legality of the FAA's decision under the Airport and Airway Improvement Act of 1982, 49 U.S.C. Section 2201, *et seq.*, to approve the O'Hare Expansion Project.

## I. THE COURT MUST CLEAR UP THE CONFUSION OVER THE MEANING AND APPLICATION OF THE TERMS "SUBSTANTIAL EVIDENCE" AND "ARBITRARY AND CAPRICIOUS"

In exercising jurisdiction under 49 U.S.C. Section 1486, the Court of Appeals acknowledged Congress' explicit command that material issues of disputed fact be reviewed under the "substantial evidence" test. Yet despite the clear doctrinal history and analytical structure of the test, lower courts are ascribing dramatically different meanings to the same term: "substantial evidence".

### A. Application of the Substantial Evidence Test Necessitates a Contested Hearing In the Agency Below On Disputed Issues of Material Fact

The doctrine of "substantial evidence" – as embodied in the Administrative Procedure Act and as embodied in this Courts' decisions in *Universal Camera Corp. v. NLRB,* 340 U.S. 474 (1951); *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938); *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292 (1939) – is a doctrine of appellate-style review of material issues of disputed fact premised on the fundamental assumption that there has been a contested hearing of those material issues of disputed fact in the agency below.

Thus, this Court was correct in that portion of its *Overton Park* decision that the substantial evidence test could not be applied if there had been no contested hearing below.

> *Review under the substantial-evidence test is authorized only* when the agency action is taken pursuant to a rulemaking provision of the Administrative Procedure Act itself, 5 U.S.C. Section 553 (1964 ed., Supp. V), *or when the agency action is based on a public adjudicatory hearing.* See 5 U.S.C. Sections 556, 557 (1964 ed., Supp.V).
>
> *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 414 (1971) (emphasis added).

This Court recognized this requirement again in *Steadman v. SEC*, 450 U.S. 69 (1981).

> Substantial evidence review by the Court of Appeals here required a hearing on the record. [citations omitted] Otherwise effective review by the Court of Appeals would have been frustrated.
>
> *Steadman v. SEC*,
> 450 U.S. 69, 97 n. 13 (1981).

The requirement reflected in *Overton Park* and *Steadman* is not a case-specific anomaly. This essential predicate – that substantial evidence review of disputed fact issues be premised on a contested hearing before the agency – has been implicitly and explicitly echoed time and time again in: 1) the genesis and development of the substantial evidence doctrine in review of ICC decision making during the first decades of the 20th century; 2) the adoption of the identical substantial evidence test in the FTC Act of 1914 (and its progeny, including the predecessor to the jurisdictional statute invoked here, 49 U.S.C. Section 1486); 3) the APA; 4) the "whole record" analysis of *Universal Camera*; 5) *Overton Park;* and 6) *Steadman*.[2]

Respondents below invoked – and the Court of Appeals accepted – application of a jurisdictional statute that mandated judicial review under the "substantial evidence" test. Despite the clear legislative history of the APA and the FTC model statutes (of which 49 U.S.C. Section 1486 is an example), the Court of Appeals applied the substantial evidence test without mandating that petitioners first receive a hearing on contested issues of disputed fact. If the statutory command of Section 1486 to decide material issues of disputed fact

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[2]The Department of Justice correctly points out that since the late 1960's, Congress has passed a number of statutes providing for rulemaking with review based on the "substantial evidence" test, without explicitly providing for an agency contested

*(Footnote continued on the following page)*

under the "substantial evidence" doctrine is to be honored, petitioners must first receive a contested fact hearing before the agency pursuant to 5 U.S.C. Sections 556-557 on those disputed fact issues.

No such hearing was provided here. If this Court wishes to change the structural content and meaning of the substantial evidence doctrine to eliminate the requirement of a prior contested hearing on disputed facts as an essential predicate to substantial evidence review – a position urged by the government – the Court will have to overrule *Overton Park* and seventy years of doctrinal structure.[3]

### B. Arbitrary and Capricious Is Not A More Lenient Standard Than Substantial Evidence

Having chosen to exercise jurisdiction under Section 1486, the Court of Appeals could not – as urged by respondents – avoid the clear statutory command to apply the "substantial evidence" test by substituting the allegedly more lenient "arbitrary and capricious" test. First, the holding of this Court in *Vermont Yankee* prohibits the Judiciary from modifying the procedural commands of Congress as to procedures for addressing material issues of disputed fact. Second, the time

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*(Continued from previous page)*

hearing on relevant disputed issues of fact. (Justice Department Brief, p.12). As of this time, this Court has not addressed the question of whether application of "substantial evidence" review under those statutes means something different than "substantial evidence" under the historical framework reflected in the FTC model statutes, the APA, and *Overton Park*. If substantial evidence under those statutes *does* have a different meaning than the substantial evidence – contested hearing on disputed facts – predicate of the APA and *Overton Park*, the difference in meaning illustrates the need for clarification by this Court of the various meanings.

[3] The *Overton Park* decision is built on two analytical pillars. The first pillar deals with the requisite procedures for application of the substantial evidence test. The second pillar deals with the procedures

*(Footnote continued on the following page)*

is long overdue for this Court to analytically examine the historical and logical content of the "arbitrary and capricious" doctrine.

Unlike the "substantial evidence" test – which is limited to appellate style review of disputed issues of fact where there has been a hearing below – the term "arbitrary" or its synonym "arbitrary and capricious" has significantly different logical and historical antecedents. Contrary to popular misconception and the opinions of some of the circuit courts relied upon by respondents, the arbitrary and capricious standard is not identical to the substantial evidence test. Moreover, contrary to popular misconception, "arbitrary and capricious" does not represent a more *lenient* standard of appellate review of material issues of disputed fact than "substantial evidence". Arbitrary and capricious does represent a *burden of proof* which is more favorable to the government than substantial evidence. But where there has been no requirement of a trial below, the arbitrary and capricious standard has always allowed a trial on disputed facts before the district court.

The confusion over the meaning of arbitrary and capricious stems from at least two sources. First the term "arbitrary

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*(Continued from previous page)*
for dealing with material issues of disputed fact when the substantial evidence test does not apply.

In this case, the government is arguing that the first analytical pillar of *Overton Park* – dealing with the analytical structure of the substantial evidence doctrine – is wrong and should be overruled. In contrast, petitioners argue that this first pillar is analytically and historically correct and governs this case.

As to the second analytical pillar of *Overton Park* – where the substantial evidence test does not apply – petitioners assert that *Overton Park* grievously misreads the legislative history of the APA and develops a judge made rule of procedure for dealing with material issues of disputed fact that is contrary to the overwhelming evidence of legislative intent in the APA legislative history and is directly contrary to the procedural model expressly mandated by Congress in the Administrative Orders Review Act, 28 U.S.C. Section 2341, *et seq.*

and capricious" can have a different connotation depending on three separate circumstances:

1. Where there are material issues of disputed fact relevant to the government action and there has been no trial of disputed issues of fact below and none is required, the district court would try and determine the disputed issues of fact under the either the Constitutional [4], the APA [5], or the Administrative Orders Review Act th[6] models.

2. Where there has been a trial below on the disputed issues of material fact and the claim of arbitrariness relates to the factual determination of the agency trier of fact as to those disputed fact issues. In this situation the concept of arbitrary and capricious has been equated with substantial evidence. *Interstate Commerce Commission v. Louisville and Nashville R.R. Co.*, 227 U.S. 88, 94 (1913).

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[4] Under *Borden's Farm Products Co. v. Baldwin*, 293 U.S. 194 (1934), Congress cannot insulate either a state statute or a Congressional statute from being challenged as arbitrary and without rational basis. In such a challenge – since no contested fact hearing is required prior to the legislative decision – the district court must try and determine disputed issues as to facts relevant to whether the legislative decision is arbitrary. If neither Congress nor the state legislature can insulate factual claims relevant to the validity of legislation from trial and determination by a district court, *a fortiori*, they cannot create such insulation by delegating the function to an administrative agency.

[5] See the APA legislative history cited in the Petition for Certiorari at pp. 20-21. Indeed, H.Rpt. No. 1980, quoted at p. 21 of the Petition for Certiorari, is the very report incorrectly cited in *Overton Park*, 401 U.S. at 415. Contrary to the statements cited by the United States at p.10 of their typewritten brief, the requirements for a trial of material issues of disputed fact in the district court where there had been no trial below – following the basic constitutional model reflected in *Borden's Farm Products* – permeate the legislative history of the APA. See additional legislative history in the Supplemental Appendix attached to this Reply.

[6] See discussion of Section 2347(b)(3), *infra*.

3. Where there are no disputed issues of material fact – unlike the substantial evidence test, which is limited to review of material issues of disputed fact where there has been a trial below – under the arbitrary and capricious doctrine the Court would still examine whether there was a rational connection between the undisputed facts and the conclusion reached by the agency. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).

The second source of confusion leading to the view that "arbitrary and capricious" is somehow more lenient than "substantial evidence" stems from the *dictum* of Justice Harlan in *Abbott Laboratories v. Gardner*, 387 U.S. 136, 143 (1967). In that famous *dictum*, Justice Harlan stated that the "substantial evidence" test provided a " more generous judicial review" than the arbitrary and capricious test.

But that statement must be understood in the context in which it was made – namely the special rulemaking and judicial review provisions of Sections 701(e) and 701(f) of the Food and Drug Act. As noted above, persons challenging a quasi-legislative act of an agency – just like the legislative act of the Congress or a state legislature – had the burden of proof to demonstrate that the factual basis of the regulation was in error. See *Borden's Farm Products.*

The drafters of the 1938 Food and Drug Act wanted to move from this procedure – where the opponents of a regulation had the burden of proof to overcome the rebuttable factual presumption supporting the legislative decision – to a procedure where the agency had the burden of proof and had to prove its case in an agency trial with judicial review of disputed issues of fact based on the substantial evidence test. Nothing in the FDA special procedures – agency trial prior to rule adoption followed by judicial review based on substantial evidence – eliminated the *Borden's Farm Products* requirement (in the absence of such special procedures) that where there was no required hearing below, the person challenging the rule as arbitrary had a right to have factual issues tried and determined by the district court.

## II. THIS COURT MUST RESOLVE THE JURISDICTIONAL AND SCOPE OF REVIEW CONFLICTS CAUSED BY DIRECT COURT OF APPEALS REVIEW UNDER FTC MODEL STATUTES WHERE THERE HAS BEEN NO HEARING BELOW AND THERE ARE MATERIAL ISSUES OF DISPUTED FACT

The conundrum faced by the Court of Appeals below – where it first assumed jurisdiction under Section 1486 and then sought to wish away the doctrinal structure of the "substantial evidence" command expressly mandated by the statute – arises from two related problems. First, the Court of Appeals took an expansive view of its jurisdiction without examining the historical structure of direct court of appeals review, the role of the substantial evidence doctrine in that direct court of appeals review structure, and the historical understanding that courts of appeal were ill-equipped to decide controversies based on disputed issues of fact which had not been tried and determined below. The jurisdictional grant of the FTC model and its progeny, including Section 1486, were premised on the trial of disputed facts in a contested hearing before the agency and application of the substantial evidence review to those disputed facts on appeal.

It was not until the Judicial Conference of the United States developed a procedure for direct court of appeals review of disputes where there was no contested hearing below, that the courts of appeals could take jurisdiction over such controversies. The procedure developed by the Judicial Conference and adopted by Congress in the Administrative Orders Review Act, 28 U.S.C. Section 2341, *et seq.* is expressly mandated by Congress in Section 2347 of that Act.

Contrary to the respondents' arguments, the Administrative Orders Review Act is not limited to some narrow category of cases. The Act and its procedural framework for addressing material issues of disputed fact – Section 2347 – govern judicial review of a broad range of agencies, including the FCC, the Nuclear Regulatory Commission, the

Department of Agriculture, the Federal Maritime Commission and the Interstate Commerce Commission. If this Court is going to expand its interpretation of the jurisdictional grant of FTC model statutes (such as Section 1486) – *without Congressional authorization* – to now include review of agency decisions involving untried material issues of disputed fact, the Court should at least incorporate across the board the procedures mandated by Congress for addressing material issues of fact where there has been no hearing before the agency.

The second problem facing the Court below is the direct contradiction between this Court's erroneous reading in *Overton Park* of the legislative history of the APA – as it relates to procedures for addressing material issues of disputed fact where there has been no hearing below – and the explicit language of the Administrative Orders Review Act. There is a direct intellectual and constitutional conflict between: a) the procedures which this Court in *Overton Park* said Congress mandated in the APA for addressing material issues of disputed fact when no agency contested hearing was required; and b) the explicit procedures mandated by Section 2347(b) of the Administrative Orders Review Act.

Under Section 2347(b)(3) where there is a genuine issue of material fact and there has been no agency trial below and none is required by law, the statute mandates the court of appeals to:

> transfer the proceedings to a district court for the district in which the petitioner resides or has its principal office for a hearing and determination as if the proceedings were originally initiated in the district court, when a hearing is not required by law and a genuine issue of material fact is presented. The procedure in these cases in the district court is governed by the Federal Rules of Civil Procedure.

Under the teaching of *Vermont Yankee,* neither the lower courts nor this Court are free to ignore this express statutory command. *Cf. Agosto v. Immigration and Naturalization Service,* 436 U.S. 748 (1978) (where this Court reversed a

court of appeals refusal to remand for district court trial of disputed facts under a statute which had been patterned after the Administrative Orders Review Act). To the extent this Court's *dictum* in *Florida Power and Light Co. v. Lorion* ___U.S. ___, 105 S.Ct. 1598 (1985), indicates that disputed issues of fact – where there was no required agency trial below – should not be tried and determined in the district court, the *dictum* is in direct violation of Congress' command in 28 U.S.C. Section 2347(b)(3) and thus violates this Court's own holding in *Vermont Yankee* that the courts are not free to ignore the procedural commands of Congress. Refusal by this Court to follow the Congressional command of 28 U.S.C. Section 2347(b)(3) would be an unconstitutional usurpation of Legislative power by the Judiciary.

## CONCLUSION

Petitioners again respectfully request that the Petition for Certiorari be granted.

Respectfully submitted,

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## Additional Legislative History of the Administrative Procedure Act

The Senate Judiciary Committee, in a comment on Section 554, the section which deals with adjudication, stated:

> There should be no disposition to compel administrative hearings where Congress has not already so provided because, as pointed out below in connection with judicial review the established law permits a trial *de novo* of the facts in all cases of adjudications where statutes do not require an administrative hearing. Moreover, as to the subjects triable *de novo* in the courts, although the administrative procedure may in some instances shift the burden of proof the parties have the right to ultimate full judicial process.
>
> *Legislative History of the Administrative Procedure Act*, S.Doc. 248, 79th Cong. 2d Sess. (1946) (hereafter "Legis. Hist.") at 22.

Similarly, in a comment on Section 706(2)(E) (relating to appellate-type review "on the record" under the "substantial evidence" test) and on Section 706(2)(F) (relating to *de novo* trial of disputed facts), the Senate Judiciary Committee stated:

> The fifth category [706(2)(E) – substantial evidence appellate review "on the record"] necessarily limits the substantial evidence rule to cases in which Congress has required an administrative hearing in which an administrative record may be made. The sixth category [706(2)(F) – *de novo* trial in the district court] expresses the correlative situation in which Congress has not provided by statute for an administrative hearing and consequently any relevant facts must be presented *de novo* to original courts of review (see *Kessler v. Streckler*, 307 U.S. 22, 35 (1939)). It should be noted that the sixth category, in accordance with the established rule, would permit trial *de novo* to establish the relevant facts as to the applicability of any rule and as to the propriety of

adjudications where there is no statutory administrative hearing.

Legis. Hist. at pp. 38-39.

Again, the Senate Judiciary Committee commented:

The sixth category [*de novo* review], respecting the establishment of facts upon trial *de novo,* would require the reviewing court to determine the facts in any case of adjudication not subject to sections 7 and 8 [556 & 557]. It would also require the judicial determination of facts in connection with rule making or any other conceivable form of agency action to the extent that the facts were relevant to any pertinent issues of law presented.